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IN THE

Supreme Court of the United States

October Term, 1963

RICHARD I. POWELL,

Petitioner,

—v.—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

In the Matter of the Application of the District Attorney of the County of Kings, for an Order Adjudging Richard I. Powell, a Witness before the Second Additional October, 1963 Grand Jury, to be in Criminal Contempt of Court because of his wilful and contumacious refusal to testify before the said Grand Jury.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, OR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, OR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Petitioner, Richard I. Powell, prays that a writ of certiorari issue to review a certain order or orders of the Court of Appeals of the State of New York entered in the above entitled case as further described *infra:* or, should such be jurisdictionally more appropriate, to review a certain order of the Appellate Division, Second Department, Supreme Court of the State of New York, which has also been entered in the above entitled case and which is likewise further described *infra.*

Opinions Below

None of the three State Courts below rendered a formal opinion. The oral statement of the reasons for decision given by the Supreme Court of the State of New York, Kings County (Honorable Miles F. McDonald, Justice), in adjudicating petitioner guilty of criminal contempt of court, is not reported but is printed in petitioner's separately bound "Special Appendix to Petition for Certiorari" * herein at pages A-64 to A-66. The Appellate Division, Second Department, of the Supreme Court of the State of New York, in affirming the conviction, rendered no opinion (Sp. App. pp. A-79 to A-81). The Court of Appeals of the State of New York, in denying leave to appeal, likewise rendered no opinion (Sp. App. p. A-97). As explained *infra*, there is probably still forthcoming in this case a further order by the Court of Appeals of the State of New York dismissing certain further appeal proceedings which petitioner is presently invoking in that Court under a theory of appeal as of right.

Jurisdiction

The order of the Supreme Court of the State of New York, committing the petitioner Richard I. Powell for criminal contempt of court was entered November 13, 1963 (Sp. App., p. A-70). Petitioner filed timely notice of appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, on November 13, 1963 (*id.*, p. A-77). The Appellate Division on December 30, 1963 af-

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* Cited herein as "Sp. App. p. ". One copy of the "Special Appendix" constitutes the certified record of the proceedings below, to be filed herewith. Nine additional copies of said "Special Appendix" are also filed herewith.

firmed the order of the Supreme Court, Kings County, which had committed petitioner for criminal contempt (*id.*, p. A-79). Applications for leave to appeal (*id.*, p. A-82) to the Court of Appeals of the State of New York from the Appellate Division's order of affirmance was denied by the Court of Appeals on January 23, 1964 (*id.*, p. A-97).

In order to eliminate any possible doubt that every available State procedural avenue for further review shall have been thoroughly exhausted for the purposes of meeting the jurisdictional requirements of the certiorari procedure in this Court, petitioner on January 21, 1964, subsequent to the filing of petitioner's prior motion for leave to appeal to the Court of Appeals of the State of New York, filed a notice of appeal to the latter Court on the theory that such appeal might be taken as of right pursuant to §5601(b)(1) of the New York Civil Practice Law and Rules (*id.*, p. A-100). This latter appeal to the Court of Appeals of the State of New York is still pending, it being anticipated that the within respondent District Attorney will move in the immediate future to dismiss said appeal and that the Court of Appeals will grant such motion for dismissal, in expected conformity with the above mentioned order of that Court which denied leave to appeal.

As of the time of the filing of this petition for certiorari, then, there exists a possible jurisdictional imperfection, i.e., if the New York State appeal avenue which we are pursuing *via* our above mentioned notice of appeal under a theory of appeal as of right needs to be exhausted in order to perfect our jurisdictional position for a certiorari application in this Court, the matter is not yet jurisdictionally ripe. We have nevertheless been obliged to file this certiorari petition at this time because the above mentioned

order of the Court of Appeals (January 23, 1964) denying leave to appeal was accompanied by a stay of execution of the judgment of commitment for criminal contempt, and this stay was limited to thirty days, which expire February 22, 1964 (*id.*, A-98). As soon as our pending appeal to the New York Court of Appeals (the above mentioned appeal which we have taken on the theory of appeal as of right) is disposed of by that Court, we shall file in this Court a supplement or amendment to this petition for certiorari (together with the necessary supplemental record) in order to complete the jurisdictional picture for consideration by this Court.

In the meantime, we respectfully pray that this Court defer final action on this petition for certiorari until such completion of the jurisdictional picture is had; this is not expected to entail any substantial delay.

Because the only action which has thus far been taken in this case by the highest Court of the State of New York, the Court of Appeals, is the denial of leave to appeal as aforesaid, and because the expected forthcoming order of that Court dismissing the appeal which we have taken to that Court under a theory of appeal as of right will likewise presumably not partake of a review on the merits of the Appellate Division's order of affirmance of the commitment for criminal contempt, this case comes before this Court in a perhaps uncertain jurisdictional posture as respects the question of whether the "final judgment" here to be reviewed is the order of the Court of Appeals (January 23, 1964) denying leave to appeal (*id.*, p. A-97) or the order of the Appellate Division affirming the order of commitment for criminal contempt (*id.*, p. A-79). It is this possible uncertainty which has prompted us to struc-

ture this petition for certiorari as seeking review, alternatively, of one or the other of the two last mentioned orders below. The supplement or amendment to this petition for certiorari which we plan to file, as above mentioned, as soon as the jurisdictional picture becomes complete in regard to our pending appeal in the Court of Appeals which we have filed on a theory of appeal as of right, will contain the necessary additional information, if any, which may bear upon the question of what is the "final judgment" herein.

The jurisdiction of this Court is invoked under 28 U.S.C. §1275(3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fifth-and-Fourteenth-Amendment self-incrimination and due process, and Sixth-and-Fourteenth-Amendment jury trial), and under certain statutes (as recited *infra*) of the United States which would affect the issue of self-incrimination in a Federal-State aspect; and since there is necessarily drawn in question the validity of a State statute (Penal Law of the State of New York, §2447—immunity) on the ground of its being repugnant to the Constitution of the United States.

Questions Presented

Petitioner, the head of a large building construction company which specializes in building one-and-two-family residences, was questioned by a State grand jury about alleged bribery of State or municipal building inspection officials, and petitioner refused to answer on grounds of self-incrimination, whereupon he was given immunity under a State statute and was thereafter convicted of criminal

contempt and sentenced to fine and imprisonment for his continued refusal to answer the Grand Jury's questions. This particular Grand Jury sector of the case is only part of a larger overall picture of State and Federal inquisition directed against petitioner in connection with alleged improprieties regarding both Federal and State building or housing officials, including (1) questioning by another State grand jury, (2) questioning by a Federal grand jury, (3) prosecution (and conviction) under a State indictment for "grand larceny" and "false pretenses" upon charges of deceitfully selling a house which had an allegedly defective sewer installation and allegedly false or deceitfully obtained building inspectors' approvals, and (4) intensive cooperation between Federal and State prosecutive officials directed against petitioner in regard to the foregoing. The questions are:

1. Does the Federal Constitution permit a State Grand Jury to confer immunity without covering Federal incrimination? Is not the meritoriousness of this question, for certiorari purposes, indicated by this Court's having granted certiorari in *Murphy and Moody* v. *The Waterfront Commission of New York Harbor* (No. 138, Oct. Term, 1963) and in *Malloy* v. *Hogan* (No. 110, Oct. Term, 1963), and by the Court's having scheduled the latter two cases to be argued conjointly early in this coming March? Was the purported grant of immunity in this case valid in view of the express exclusion of any grant of immunity against Federal incrimination, and does not this case present—along with the *Murphy-Moody* and *Malloy* cases, *supra*—a proper occasion for abrogation of the ruling in *Knapp* v. *Schweitzer*, 357 U.S. 371, approving a State grant of im-

munity even though Federal incrimination might result as well as perhaps also a proper occasion for overruling *Twining* v. *New Jersey*, 211 U.S. 78 (allowing the State to compel self-incrimination despite the Fifth and Fourteenth Amendments)?

2. Was the proffered immunity in this case federally unconstitutional in any event because of the cooperation between State and Federal crime enforcement officials, within the meaning of the reservation for such situations in *Knapp* v. *Schweitzer* (357 U.S. at p. 380)?

3. Was the proffered immunity federally unconstitutional by reason of its impingement upon the situation surrounding the petitioner's prior State Court conviction for grand larceny and false pretenses which is presently being appealed?

4. Was petitioner entitled by the Federal Constitution to a jury trial of the State charges of criminal contempt?

Statutes and Constitutional Provisions Involved

The issues of self-incrimination and due process in the case involves the Fifth and Fourteenth Amendments of the United States Constitution; the jury trial issue involves the Sixth and Fourteenth Amendments.

The State criminal contempt proceedings herein were brought pursuant to the Judiciary Law of the State of New York, §750. The purported conferral of immunity upon the petitioner was pursuant to the Penal Law of the State of New York, §2447. These statutes are quoted in the Appendix to this petition for certiorari, *infra*. The Federal statutes

as to which petitioner claims that the within State grand jury interrogation and immunity proceedings subjected him to Federal incrimination are cited and discussed *infra*.

Statement of the Case and of how the Federal Questions Are Presented*

On October 21, 1963 petitioner was questioned by a grand jury of Kings County, New York, concerning alleged bribes to State building inspection officials, in connection with housing constructed by petitioner's company (Sp. App., pp. A-1 to A-7). Petitioner refused to answer these questions, invoking his privilege against self-incrimination (*ibid*). Thereupon the Grand Jury purported to confer upon petitioner immunity pursuant to N.Y. Penal Law, §2447 (*id.*, p. A-5). Petitioner thereupon inquired of the Grand Jury whether this immunity would protect him against Federal prosecution, and he was advised by the Assistant District Attorney, Mr. Koota, that it would not (*id.*, p. A-6). Petitioner also inquired whether the immunity would affect a conviction which had shortly theretofore (September 6, 1963) been rendered against him upon a jury verdict** of guilt of grand larceny in the first degree (by false representations) and obtaining property by false pretenses (*ibid*); these latter criminal proceedings against

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* The State criminal contempt proceedings from which this certiorari application derives did not produce any printed record or "appendix" in the appellate courts below, because the matter was processed throughout the state appellate proceedings upon the original papers on file. For the purposes of this certiorari proceeding petitioner has printed, in the form of the earlier mentioned "Special Appendix", the entire relevant text of the certified transcript of the original record in the proceedings below.

** Which had been rendered earlier in the year 1963.

petitioner arose out of charges by a purchaser of one of the houses built by petitioner's company that petitioner had concealed the existence of a certain disapproved sewer installation*. The Assistant District Attorney replied that if the aforesaid conviction were reversed on appeal and petitioner were ordered to a new trial on the same indictment then the immunity would apply, but that if the conviction were affirmed on appeal the immunity would be inapplicable (*ibid*). Petitioner thereupon continued his refusal to answer the Grand Jury's questions (*id.*, p. A-7).

It is especially important to note also, as a part of the background of petitioner's alleged contempt in the grand jury situation here being described, that at the time of petitioner's grand jury appearance he knew or in good faith believed that there had been some information transmitted or shown by the office of the District Attorney of Kings County to the office of the United States Attorney of the Eastern District of New York which purported to show that the petitioner had paid bribes to public officials (state and federal) in connection with the home building operations

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* Petitioner's conviction in the prosecution above referred to is presently on appeal to the Appellate Division of the New York Supreme Court. The central issue in that appeal is whether petitioner was unjustly convicted of felonious crime (in a situation which amounted at most to a typical municipal "building code" violation) in view of the Trial Court's refusal to let the Jury consider the undisputed trial proofs that the sewer line troubles were caused by the City of New York's own defective sewer system and that petitioner sincerely believed the City was remedying these defects (which was in fact also undisputedly true); in short the main issue in the criminal prosecution for grand larceny etc. is whether petitioner was denied a fair trial by the Trial Court's refusal to let the Jury pass in any realistic sense on the issue of petitioner's criminal intent. See *People* v. *Richard I. Powell* and *Donven Realty Corp.*; Indictment #3048-1962, S. Ct. of N. Y. Kings Co., presently on appeal to S. Ct. of N. Y. App. Div., 2d Dept.

of his company in Brooklyn; also, in April, 1963 the petitioner had appeared as a witness before a Federal Grand Jury in the Eastern District of New York pertaining to that same or to a related subject matter; in the latter Federal Grand Jury proceeding the petitioner had invoked the Fifth Amendment privilege against self-incrimination and he was excused by the Federal Grand Jury (*id.*, pp. A-19 to A-23). Additional facts pertaining to the subject of this paragraph are recited *infra*.

On October 22, 1963, which was the day after petitioner's grand jury appearance, petitioner was cited for contempt by an order to show cause issued by the Supreme Court of New York, Kings County, Hon. Miles F. McDonald, *J.*, pursuant to §750 of the Judiciary Law of the State of New York (quoted in the Appendix hereto *infra*); the order to show cause is printed in Sp. App., p. A-8.

The petitioner filed an answer to the aforesaid contempt citation in the form of an affidavit, denying contumacious intent and averring, *inter alia*, that he feared Federal incrimination if he were forced to answer the aforementioned questions before the Kings County Grand Jury (*id.*, pp. A-16 *et seq.*). The petitioner also requested a judicial trial in the manner of a criminal trial of the issue of his guilt or innocence, and he requested a jury trial of the charge of criminal contempt (*ibid*).

The contempt trial was held on November 7, 1963 (*id.*, p. A-34), the request for jury trial having previously been denied, to which exception was duly taken (*id.*, p. A-30). Testimony taken from Raymond Bernhard Gruenwald, Assistant United States Attorney in the Eastern District of New York, Aaron E. Koota, Chief Assistant District Attor-

ney of Kings County, and Irving P. Seidman, Assistant District Attorney of Kings County, established that the office of the District Attorney of Kings County had in fact sought out the United States Attorney for the Eastern District of New York many months prior to petitioner's Kings County Grand Jury appearance in October, 1963, for the purpose of supplying to the United States Attorney information and documents obtained under a search warrant by the Kings County District Attorney which allegedly indicated the payment by the petitioner of bribes to Federal housing officials; that the United States Attorney had been in possession of this information at the time of petitioner's appearance before the Federal Grand Jury as aforesaid; that agents of the Federal Bureau of Investigation had conferred upon this subject with representatives of the Kings County District Attorney's office, along with representatives of the United States Attorney's office; and that, apparently, additional information relating to this cooperation between the Federal and State prosecutive officials was in the possession of the Federal officials but would not be disclosed by them in the within State Court contempt proceedings before Mr. Justice McDonald on the ground of confidential Federal privilege to refuse to disclose the contents of criminal prosecution files of the United States Department of Justice (*id.*, pp. A-36 to A-57).

Petitioner, taking the stand in the contempt trial, denied any contumacious intent and swore that he feared Federal incrimination (*id.*, pp. A-58 *et seq.*).

It was urged in a memorandum of law on behalf of petitioner in said contempt trial that the indications in this

record of collaboration between the Federal and State prosecutive officials with a view to incriminating petitioner justified him in declining the proffered State immunity by reason of its failure to immunize him against Federal incrimination, petitioner invoking the authority of *Knapp* v. *Schweitzer*, 357 U.S. 371, where the Court, although approving a State grant of immunity even though Federal incrimination might result, did also expressly reserve the case of an actual Federal-State cooperative effort at incrimination. Petitioner in his aforesaid memorandum also brought to the attention of the Court in this contempt trial that on October 14, 1963 this Court had granted certiorari in the case of *Murphy and Moody* v. *New York Harbor Waterfront Commission* (Oct. Term 1963, No. 138), the principal question in the *Murphy-Moody* case being whether purported State grants of immunity were valid notwithstanding express exclusion of immunity against Federal incrimination and notwithstanding the indicated probability of Federal-State collaboration in the incrimination situation presented; that included in *Murphy-Moody* was the question of whether *Knapp* v. *Schweitzer*, 357 U.S. 371 (approving a State grant of immunity even though Federal incrimination might result) should be over-ruled; and that the grant of certiorari in the *Murphy-Moody* case was significant for still another reason pertinent to the instant situation, namely, that this Court had set down the *Murphy-Moody* certiorari to be argued concurrently with *Malloy* v. *Hogan* (Oct. Term 1963, No. 110), the *Malloy* case involving the historic constitutional issue of whether the Fifth Amendment self-incrimination provision applies directly to the States through the Fourteenth Amendment.

Mr. Justice McDonald (in the contempt trial herein) held that the rule of *Knapp* v. *Schweitzer* which permits state immunity without protection against Federal incrimination, being as yet unreversed by this Court, was applicable to the instant case notwithstanding the grant of certiorari in the *Murphy-Moody* Case. Mr. Justice McDonald also ruled that State Grand Jury evidence in this matter may not be disclosed to any Federal Grand Jury without a court order. Mr. Justice McDonald also held that the reservation in the *Knapp* case as to instances of Federal-State collaboration was likewise inapplicable here because such collaboration was not established by the testimony in the instant contempt trial. Mr. Justice McDonald noted, in the latter connection, that he was powerless to force the Federal-official witness to disclose further contents of the Federal files or records relating to this case. See Sp. App., pp. A-64 to A-66. Mr. Justice McDonald found petitioner guilty of criminal contempt of court and sentenced him to be imprisoned in the New York City Civil Jail for a term of thirty days, and in addition thereto, to pay a fine of $250.00 and to be imprisoned for a term of thirty days additional in the event that he fail to pay the fine (*id.*, A-70).

The execution of this sentence was stayed pending appeal, and it has remained so stayed down to the present time.

As recited under the heading "Jursidiction", *supra*. petitioner appealed the order of commitment for criminal contempt to the Appellate Division of the Supreme Court, Second Department (*id.*, p. A-77). That Court affirmed the order of commitment, without opinion (*id.*, A-79 to A-81). As also previously recited, the Court of Appeals

of the State of New York denied, without opinion, leave to take a further appeal (*id.*, p. A-97). Petitioner's further effort to take a State Court appeal by proceeding under a theory of appeal as of right in the Court of Appeals of the State of New York (*id.*, p. A-100) continues not yet disposed of, as likewise earlier recited.

Petitioner's presentation, in his aforementioned appeal to the Appellate Division, and in the proceedings upon his application for leave to appeal to the Court of Appeals, included a typewritten "Brief for Appellant"; the same brief was used for this purpose by petitioner in both of the latter State courts. We quote the "Statement of Questions Involved" and the "Point" headings of the Argument in that typewritten brief:

> "*Statement of Questions involved*
>
> 1. Do the Federal and State Constitutions permit a State Grand Jury to confer immuntiy without covering Federal incrimination?
>
> 2. Is the proffered immunity in this case unconstitutional in any event because of the cooperation between State and Federal crime enforcement officials, within the meaning of the reservation for such situations in *Knapp* v. *Schweitzer* (357 U.S. at p. 380)?
>
> 3. Do the interests of justice and of sound judicial process call for the postponement of the decision of this appeal, and continuation of the stay of execution of sentence, until after the Supreme Court of the United States shall have decided the cases of *Murphy* v. *New York Harbor Waterfront Commission* and *Malloy* v. *Hogan*?
>
> 4. Is the proffered immunity unconstitutional by reason of its impingement upon the situation sur-

grounding the appellant's prior conviction for grand larceny which is presently being appealed?

5. Was appellant constitutionally entitled to a jury trial of the charges of criminal contempt?"

The Points of petitioner's argument in his aforementioned brief in the State appellate courts below were captioned as follows:

"Point I

In the interests of justice and of a judicially sound and properly informed determinationof the important question of constitutional law presented—viz., the question of the validity of State conferred immunity which does not cover Federal incrimination —[said question] should not be decided by this Court until after the Supreme Court of the United States has decided the cases of *Malloy* v. *Hogan* and *Murphy* v. *New York Harbor Waterfront Commission.* It would be a denial of essential justice, if not of due process of law, to affirm the instant contempt conviction without awaiting a decision by the Supreme Court of the United States in the latter two cases, because appellant may be required to serve out his full sentence only to find afterwards that the existing doctrine allowing State immunity without covering Federal incrimination (Knapp v. Schweitzer, 357 U.S. 371) has meanwhile been overruled by the highest court of the land."

"Point II

The overall unfairness of the District Attorney's attempts to incriminate the appellant and now to jail him for contempt is intensified by the following:— The proffered State immunity is constitutionally ineffectual insofar as it fails to cover, of insofar as it obscures and confuses, appellant's privilege

against self-incrimination with respect to the charges of grand larceny under which he has been convicted and is presently prosecuting an appeal."

"Point III

Appellant was entitled to a jury trial of the charge of criminal contempt."

These same points were in essence presented to the Court of Appeals in petitioner's motion papers for leave to appeal (Sp. App., pp. A-84 *et seq.*).

Reasons for Granting the Writ

1. The pendency before this Court at the present time of No. 110 (Malloy v. Hogan) and No. 138 (Murphy and Moody v. The Waterfront Commission of New York Harbor), wherein certiorari has been granted and oral argument is to be had (we are informed) early in March of this year, affords to us our prime ground for requesting certiorari in the instant case of petitioner Richard I. Powell. Petitioner Powell's case presents exactly the same issues as does the *Murphy-Moody* case in regard to the constitutionality of a State conferral of immunity which expressly excludes immunity against Federal prosecution, except that our case is even stronger than the *Murphy-Moody* case as respects the reservation in *Knapp* v. *Schweitzer*, 357 U.S. 371, where the Court reserved future situations presenting the problem of Federal-State collaboration in crime-enforcement. If the reason for the granting of certiorari in *Murphy-Moody* was that this Court is disposed to reconsider the primary ruling of *Knapp* v. *Schweitzer* (which approved a State grant of immunity even though Federal in-

crimination might result), then we submit in all respectfulness that the same reason for granting certiorari exists in our case. And if the reason for the granting of certiorari in *Murphy-Moody* was in whole or in part the factor of possible collaboration between Federal and State crime-enforcement officers, then our case in this respect stands powerfully *a fortiori*. For in our case it was admitted by the Federal officials that they were invited by the State District Attorney's office to come and share the latter functionaries' alleged information concerning the petitioner; the petitioner was actually summoned before a Federal Grand Jury as a direct result of this; and when we tried to find out more about this in the instant contempt trial before Mr. Justice McDonald, we were blocked by that Court's ruling that the Federal officials' declination to reveal more about this situation would not be overborne, seemingly by reason of some conception of privilege or comity in relation to Federal official secrets. Nevertheless, although we were thus blocked from further inquiry concerning the Federal-State collaboration in our case, we were able to elicit the facts above described concerning the State "tip off" to the Federal men and the latter's use of this State information in a Federal Grand Jury interrogation of the petitioner in April, 1963. In the *Murphy-Moody* case, the indicia of Federal-State collaboration were persuasive but not nearly so manifest; they rested on the circumstance of the "waterfront" character of the crime-enforcement activities involved, all efforts by the *Murphy-Moody* petitioners to find out more about this having been thwarted by the refusal of the lower courts to allow the question to be explored at all by discovery procedures or otherwise (see the *Murphy-Moody* petition for certiorari at pp. 4, 16, 18, 21-22).

The specific Federal criminal statutes under which petitioner Powell might be incriminated if he were to answer questions of the type put to him by the State Grand Jury on October 21, 1963, include 18 U.S.C. § 201, the basic statute as to bribery of federal officers; 18 U.S.C. § 1010, which makes it a crime knowingly to utter any false statement "for the purpose of influencing in any way the action" of the Federal Housing Administration; and the Federal provisions with respect to conspiracy (18 U.S.C. § 371) and aiding and abetting (18 U.S.C. § 2).

The peril of Federal incrimination and prosecution to which petitioner has been subjected by the unilateral conferral of State immunity in this case is not effectively lessened, moreover, by the announcement of the sentencing Judge (in the contempt proceedings below) that the State grand jury evidence would not be permitted to be disclosed to any Federal grand jury without a court order (Sp. App., p. A-65). Aside from the fact that there is here no assurance, of course, against such a permissive court order one day being granted, what of the always vexing question of incriminatory "leads" which would obviously be available to zealous Federal police and prosecutive officials *via* their informal "contacts" with the State officialdom—and exactly this has already been happening in our case, as seen. A person in the position of petitioner Powell could be quite effectively victimized by such behind-the-scenes Federal-State collaboration on the level of investigative "leads", without the matter's ever having to reach the open formality or the judicial scrutiny of an attempt to submit to a Federal grand jury the State grand jury evidence which is supposedly being held under the protective monitoring of the State courts. Furthermore, what of the

incriminatory peril to petitioner Powell if his coerced State Grand Jury testimony were to result in an indictment for allegedly bribing building inspection officials, whereupon such testimony of Powell obviously would not and could not be saved from public disclosure?

Turning now to the question of the way in which the granting of certiorari in *Malloy* v. *Hogan* (No. 110) favors the granting of certiorari in our case, we respectfully refer the Court to the Petitioners' Brief (on the merits) in *Murphy-Moody* (No. 138), pp. 35-39, where it is pointed out that the granting of certiorari conjointly in *Malloy* and in *Murphy-Moody* indicates that the Court may be disposed at this time to undertake a fundamental reexamination of the doctrine of *Twining* v. *New Jersey*, 211 U.S. 78, which held that, notwithstanding the Fifth and Fourteenth Amendments, the States were free to compel self-incrimination. A ruling by this Court that the Fifth Amendment self-incrimination privilege applies to the States through the Fourteenth Amendment, taken together with an overruling of *Knapp* v. *Schweitzer* (*via* the *Murphy-Moody* certiorari), would import into the field of state inquisitional immunity the constitutional obligation to render any such conferral of state immunity equal in scope to the constitutional protection and privilege (the Federal Fifth Amendment) which is sought to be over-borne. Such a step by this Court would make the privilege against self-incrimination truly National in its effectiveness, and would once and for all eliminate the qualifications and the exceptions of decisional nicety which have had the "whipsawing" consequences upon individuals trapped in the Federal-State incrimination-and-immunity dilemma as noted in recent dissenting opinions in this Court. And since such a ruling

by this Court, which may be forthcoming from *Malloy* or *Murphy-Moody*, would also be dispositive of our case, it is submitted that thereby arises a further persuasive reason for the granting of certiorari in our case.

In view of the exhaustive briefing which is presently before this Court on the issues of the Federal-State incrimination problem in the *Malloy* and the *Murphy-Moody* cases, we refrain from burdening the Court and from lengthening this petition with any further rethreshing of the subject in its broad constitutional features; we especially refer the Court to Point I of the argument in the *Murphy-Moody* brief on the merits (pp. 34-62), and we respectfully adopt the discussion of the authorities and of the issues of constitutional policy there presented.

2. The overall unfairness, as a matter of due process of law, of the attempts by the State District Attorney to incriminate petitioner Powell and to jail him for contempt is intensified by the following: The proffered State immunity was constitutionally ineffectual in point of due process of law insofar as it failed to cover, or insofar as it obscured and confused, petitioner's privilege against self-incrimination with respect to the State charges of grand larceny and false pretenses under which he has been convicted and is presently prosecuting his State court appeal. The affidavit of Assistant District Attorney Koota in support of the contempt citation herein stated, in part, that "I advised the said witness that if his judgment of conviction were reversed by the Appellate Court, he would have immunity against further prosecution of the charge upon which he was convicted, but if the Appellate Court affirmed the conviction, the grant of immunity herein would not affect the judgment of conviction" (Sp. App., p. A-14).

We submit that the District Attorney's office has been playing cat-and-mouse with petitioner Powell in this entire matter of interrogating him about an area of alleged conduct as to a part of which he has already once been prosecuted and adjudged in a State criminal proceeding. Indeed, the District Attorney specifically interrogated Powell, in the State grand larceny and false pretenses trial, about whether he had paid bribes to building inspection officials, Powell denied any such payments, and the Trial Court in that prosecution instructed the Jury that Powell's denials were binding upon the District Attorney. See the printed Record on Appeal in *People* v. *Richard I. Powell and Donven Realty Corp.*, pp. 362-366, 370, presently pending in N.Y.S. Ct. App. Div. 2nd Dept. (Indictment No. 3048-1962). Is it due process of law, after a defendant in a criminal prosecution has successfully weathered an imputation of crime (bribery) collateral to the main criminal charge in the case (grand larceny and false pretenses), to drag that defendant on a later date before a Grand Jury in order to extort from him self-incriminating testimony on that same bribery charge, and to implement this compulsion by a supposed "immunity" which is expressly surrounded with a seemingly deliberate confusing and obscuring qualification as to how it will affect the subject matter of the criminal prosecution in question?

Aside from the bribery incrimination feature viewed in itself, the due process injustice strikes deeper:—We have earlier noted petitioner's experience in April, 1963, before a Federal Grand Jury to which the State officials "fed" him; and that he was called to testify by a prior State Grand Jury before the March 1963 trial of his grand larceny and false pretenses indictment. On this latter oc-

casion he was asked questions similar to those involved in the present contempt case, and he was excused by that Grand Jury after he invoked his privilege against self-incrimination (Sp. App., p. A-20). Nevertheless now, after he has suffered the full measure of the State-imposed jeopardy under that grand larceny and false pretenses indictment, and while he is prosecuting his appeal from the very judgment of conviction under that indictment, he is haled again before a State Grand Jury where he is subjected to questions which re-thresh, *pro tanto*, the very same ground of the criminal trial in which he was recently convicted and from which he is, right at this moment, seeking relief by an appeal (pending which he is in the due enjoyment of his right to continuing physical freedom under a duly granted state certificate of reasonable doubt). It is shocking, we submit, that a person who has just been convicted under criminal charges should thus be harrassingly hauled back into a criminal-inquisitional forum where, *pro tanto*, the same subject matter is involved. The judicial instinct against prosecutive outrage which this sort of inquisitorial harassment arouses in terms of constitutional due process—not to say outright violation of the privilege against self-incrimination in itself—finds expression in such decisions as *United States* v. *Miranti*, 253 F. 2d 135 (C.A. 2 1958); and *United States* v. *Chiarella*, 184 F. 2d 903 (C.A. 2 1950). It is pertinent to recall also the theme that issues looking to a defense akin to that of double jeopardy in a state prosecution for crime are cognizable under the Fourteenth Amendment due process clause on the basis of tests of the general fairness of state exercise of the power of criminal prosecution in such due process terms. See *Bartkus* v. *Illinois*, 359 U.S. 121,

127; *Palko* v. *Connecticut*, 302 U.S. 349; and the concurring opinion of Mr. Justice Frankfurter in *Brock* v. *North Carolina*, 344 U.S. 424, 429. In the *Bartkus* case, *supra*, the Court, citing the *Palko* case, *supra*, recognized that "at some point the cruelty of harrassment by multiple prosecution by a State would offend due process". In the *Brock* case, *supra*, Justice Frankfurter said (p. 429), "A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted * * * ".

It is therefore submitted that, in its overall impact upon the constitutional rights of the petitioner Powell, the instant effort to subject him to further Grand Jury interrogation constitutes an abuse of the inquisitional power of the Grand Jury which is of so unseemly and shocking a character as to amount to a denial of constitutional due process and to call for this Court's protective intercession.

3. As recited in our statement, *supra*, petitioner requested and was denied a jury trial of the charges of criminal contempt. At the time this is written the Court has not yet rendered its decision in the pending case of Governor Barnett of Mississippi (*United States* v. *Ross R. Barnett*, Oct. Term, 1963, No. 107). Our ensuing discussion of the jury trial question in the instant case of criminal contempt will please be read by the Court with this last-mentioned circumstance in mind.

In the *Barnett* case the historic issue of the right to jury trial in criminal contempt is being reexamined by the Court. The Court's undertaking of this re-examination indicates, of course, that *Green* v. *United States*, 356 U.S. 165, is not

necessarily dispositive of the question of whether a defendant in criminal contempt proceedings is constitutionally entitled to a jury trial. Moreover, the *Green* case dealt with Federal not State criminal contempt proceedings. This difference is not nominalistic. For it entitles us to point out that the Court has not considered the State-level question *de novo* since it first held some seventy five years ago, in *Eilenbecker* v. *District Court*, 134 U.S. 31, that the Federal Constitution does not require a jury trial in State prosecutions for criminal contempt. Indeed, as shown in the accompanying footnote*, in the few instances in which the Court has subsequently cited the *Eilenbecker* case, it has done so without new comment; and only two of those were state contempt cases, where, respectively, a jury had not been demanded (*Tinsley*), and an attorney was behaving defiantly *in facie curiae* and was convicted *instanter* (*Fisher*).

We therefore submit that the constitutional right of jury trial in criminal contempt should not have been denied to petitioner Powell in the instant proceeding; and that the issue presented by such denial merits the granting of certiorari.

---

* *Eilenbecker* has been cited by this Court in *In Re Debs*, 158 U.S. 364, 596 (federal contempt); *Tinsley* v. *Anderson*, 171 U.S. 101, 108 (state contempt, jury trial not demanded); *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 337 (federal contempt); *United States* v. *Shipp*, 203 U.S. 563, 575 (contempt of Supreme Court, *Eilenbecker* cited for another point); *Myers* v. *United States*, 264 U.S. 95, 104 (federal contempt, *Eilenbecker* cited for another point); *Fisher* v. *Pace*, 336 U.S. 155, 159n. (state contempt, attorney disobeying court's limitation on argument); *Green* v. *United States*, *supra* (federal contempt). See also the dissenting opinions in *Bridges* v. *California*, 314 U.S. 252, 286 (state contempt, conviction reversed), and *United States* v. *United Mine Workers*, 330 U.S. 258, 367n. (federal contempt).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted. Petitioner also prays that the Court defer final action on this petition until the possible jurisdictional imperfection mentioned under our heading "Jurisdiction", *supra*—in regard to the still pending State Court appeal which petitioner has taken under a theory of appeal as of right—can be remedied, which is expected to be done in the very near future.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
Richard I. Powell

Appendix A—Orders or Judgments Below

1. Order of Commitment for Criminal Contempt

(Printed in Separate Appendix, p. A-70)

2. Order of Affirmance by the Appellate Division, Second Department

(Printed in Separate Appendix, p. A-79)

3. "Opinion" of the Appellate Division, Second Department

(Printed in Separate Appendix, p. A-81)

4. Order of Court of Appeals Denying Leave to Appeal

(Printed in Separate Appendix, p. A-97)

Appendix B—Statutes

1. New York Judiciary Law, §750

§ 750. *Power of courts to punish for criminal contempts*

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court can not punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the judiciary law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein. Applications to punish the accused for a contempt specified in this

subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the supreme court at which contested motions are heard, or of the county court if the supreme court is not in session. As amended L.1954, c. 305, § 18; L.1955, c. 864; § 13, eff. July 1, 1955.

B. In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state.

C. A court not of record has only such power to punish for a criminal contempt as is specifically granted to it by statute and no other. As amended L.1937, c. 311, § 2; L.1940, c. 202, § 15; L.1943, c. 538; L.1947, c. 900, § 1, eff. Sept. 1, 1947.

2. New York Penal Law, §2447

§ 2447. *Witnesses' immunity*

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such

refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeitures for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may neverthless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him. Added L.1953, c. 891, § 1, eff. Sept. 1, 1953.

Office-Supreme Court, U.S.
FILED
MAY 16 1964
JOHN F. DAVIS, CLERK

No. [redacted]

IN THE

Supreme Court of the United States

October Term, 1963

RICHARD I. POWELL,

Petitioner,

—v.—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

In the Matter of the Application of the District Attorney of the County of Kings, for an Order Adjudging Richard I. Powell, a Witness before the Second Additional October, 1963 Grand Jury, to be in Criminal Contempt of Court because of his wilful and contumacious refusal to testify before the said Grand Jury.

PETITIONER'S SPECIAL APPENDIX TO PETITION FOR CERTIORARI

(Printed for proceedings on petition for certiorari in the Supreme Court of the United States, and comprising all relevant papers in the record below.)

MAURICE EDELBAUM
Attorney for Petitioner,
Richard I. Powell
250 Broadway
New York, New York

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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PETITIONER'S SPECIAL APPENDIX

Minutes of Second Additional October, 1963 Grand Jury

Monday, October 21, 1963
10:00 o'clock, a.m.

PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

—against—

JOHN DOE, GENERAL INVESTIGATION,
Defendant.

Appearing:

EDWARD S. SILVER, Esq.
District Attorney, Kings County,

By: AARON E. KOOTA and IRVING SEIDMAN, Esqs.
Assistant District Attorneys

MARTIN KERN
Grand Jury Reporter

* * * * *

RICHARD I. POWELL, residing at 1339 East Boxwood Drive, Hewlett, Long Island, New York, having been duly sworn testified as follows:

By Mr. Koota:

Q. Mr. Powell, I want to explain the reason for your appearance here as a witness before the grand jury. You are

now before the Second Additional October Grand Jury in the County of Kings for the October, 1963 Term of the Supreme Court. This grand jury is conducting an investigation to determine whether the crimes of bribery or conspiracy were committed in the County of Kings in connection with the construction of one and two family homes in the Mill Basin and Canarsie areas of Brooklyn in the County of Kings, and it is in connection with that investigation that you have been called as a witness. Now, your own actions are called into question here. This grand jury is attempting to determine whether you, yourself, or the Donven Realty Corporation has made payment of bribes or has entered into a conspiracy in connection with bribing public officials in the Borough of Brooklyn, County of Kings in connection with the construction of these homes. Therefore, I want in all fairness to warn you that you have a right to refuse to answer any question that I put to you if you believe that that answer to my question may tend to incriminate you. All you have to do is say that you refuse to answer because you believe the answer may incriminate you. It is not important what language you use, so long as you indicate your intent not to answer. In that event, the grand jury cannot compel you to answer the question unless they give you immunity. Is what I have said up to this point clear to you? A. Yes, sir.

Q. I want to ask you certain questions. You have an attorney, do you not, Mr. Powell? A. Yes, sir.

Q. Is your attorney Mr. Maurice Edelbaum? A. Yes, sir.

Q. Have you consulted with him before your appearance before this grand jury in connection with your rights as a witness? A. He has advised me, yes.

Testimony of Richard I. Powell

Q. Mr. Powell, on or about March 23, 1960 in the County of Kings, did you give $530 in cash to a public official in the Building Department as a payment on account for 53 houses on East 83rd Street in Kings County to permit you to use clay instead of cast iron pipe? A. I respectfully refuse to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, on or about April 6, 1960 did you give $530 cash to a public official in the Building Department in the County of Kings as a second payment on account for the same 53 houses on East 83rd Street? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, on or about October 16, 1959, did you give to a public official in the Building Department in the County of Kings $350 cash covering 70 houses at five dollars each on East 85th Street on the north side of Avenue N? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, on or about October 9, 1959 in the County of Kings, did you give $590 cash to a public official in the Building Department to permit an amendment of plans and specifications to permit you to use orangeburg pipe instead of cast iron pipe covering jobs 166 to 194 and jobs 136 to 165, a total of 59 jobs, on the basis of $10 a job? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, on or about October 27, 1960, did you give $200 cash to a public official in the Office of the Borough President of Kings or Borough of Brooklyn for the grading of Avenue N from East 83rd to East 84th Street and also for grading on East 83rd Street between Avenue

M and N? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, on or about September 10, 1956 did you pay $500 cash to an official in the Building Department in the County of Kings of the City of New York, as noted on page nine of your cash disbursement book? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, during the period from August, 1956 through April, 1960, did you make payments to officials in the Police Department of the City of New York approximating $3,000? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, will you step outside just one moment? A. Yes, sir.

Q. The purpose, I may say, Mr. Powell of your leaving the room is for the jury to determine whether they will grant you immunity? A. Okay.

Mr. Koota: Mr. Foreman, Ladies and Gentlemen of the Grand Jury, under Section 2447 of the Penal Law, this witness, Mr. Powell, was entirely within his rights in refusing to answer the seven questions which I propounded to him. He cannot be compelled to answer those questions unless you grant him immunity. The law requires that before immunity can be granted, the District Attorney must ask the grand jury to grant immunity. If the grand jury concurs and the foreman then directs the witness to answer the question, if he answers the question he receives the immunity that the law permits. In this case the District Attorney recommends that the grand jury grant immunity to this witness in

the interest of the overall large investigation to determine whether public officials in the County of Kings have received graft or bribes.

(Thereupon, the Assistant District Attorneys and the Grand Jury Reporter left the room. Upon being summoned to return, the Foreman made the following statement:)

The Foreman: The grand jury has voted to grant immunity.

(Thereupon, the witness resumed the stand.)

By Mr. Koota:

Q. Mr. Powell, during your absence from the grand jury room the grand jury has voted to give you immunity. I would like you to understand what that means. The Foreman will direct you to answer the seven questions which I put to you. If you answer the questions, then you may not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which in accordance with the direction of the foreman, you give answers or produce evidence, and no such answers that you give or any evidence you produce shall be received against you upon any criminal proceeding, which is how the statute defines giving you immunity. But, on the other hand, if you refuse to testify, even though the foreman directs you to testify, then you will be guilty or may be guilty of contempt of Court for refusing to answer. If you do answer the questions, but you lie, then you may also be guilty of perjury. Is that clear, Mr. Powell? A. Yes, that's clear.

Mr. Koota: Mr. Foreman, I ask you that you direct the witness, pursuant to the vote of the grand jury, to answer each of the seven questions which I propounded to him earlier this morning and which he has refused to answer.

The Foreman: I direct the witness to answer the questions propounded by the District Attorney.

A. This immunity, will this grant me federal immunity?

Q. I cannot advise you as to your legal rights. The immunity which we have accorded you today is immunity under the law as it exists in New York today. Your own attorney will have to advise you whether this immunity governs federal prosecution. A. Plus the fact I have a conviction over me which is presently under appeal.

Q. The immunity which you are now given does not affect the present conviction. However, you state that a prior conviction is now on appeal. In the event there is a reversal by the Appellate Court and you are ordered to stand a new trial on the same indictment for which you were prosecuted, then by giving you immunity now, you do have immunity against that other crime, only if the Appellate Division reverses. But if they should affirm the conviction, then you do not receive immunity against that. Will you answer the questions directed by the Foreman? A. In other words, I don't get immunity from possible federal prosecution?

Q. Under the law, Mr. Powell, the granting of immunity here does not give you immunity against prosecution by the federal authorities for any violation of a federal statute which you may have committed. Now, I ask you again, will you answer the questions as directed by the Foreman?

A. Am I to give you an answer? Will I answer the questions which you asked me?

Q. I have asked you seven questions this morning which you refused to answer. Now the Foreman directs you to answer those questions. Now I ask you will you answer those seven questions? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. That is the position you take with respect to each of these seven questions? A. I respectfully decline to answer on the grounds that it may degrade or incriminate me.

Q. Mr. Powell, you will now proceed with us, please, to Part I of the Supreme Court, Criminal Part, where the presiding judge will— A. Will my attorney be notified?

Q. Yes, your attorney will be notified so that on this application he will be present in Court.

(Hearing adjourned.)

Order to Show Cause to Adjudicate Witness for Contempt of Court

SUPREME COURT

KINGS COUNTY

In the Matter of the Application of the

DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful refusal to testify before the said Grand Jury.

Upon reading the annexed affidavit of Aaron E. Koota, duly sworn to the 22nd day of October, 1963, and upon the proceedings heretofore had herein:

Let Richard I. Powell show cause before me at Criminal Term, Part I of this Court, to be held at the Courthouse thereof, Civic Center at Montague Street, in the Borough of Brooklyn, City and State of New York, on the 25th day of October, 1963, at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, why an order should not be made herein adjudicating him to be in Criminal Contempt of this Court for his contumatious and unlawful refusal after being duly sworn to answer the seven legal and proper interrogatories, or any of them, propounded to him before the Grand Jury of the County of Kings, as more particularly set forth in the annexed affidavit, and why he should not be punished therefor pur-

Order to Show Cause to Adjudicate Witness for Contempt of Court

suant to Section 750 of the Judiciary Law, and why such other and further relief should not be granted herein as may be just and proper in the premises.

Let service of a copy of this order and the affidavit upon which it is based, on or before the 22nd day of October, 1963, at 5:00 o'clock in the afternoon thereof, be deemed sufficient.

/s/ MILES F. McDONALD
Justice of the Supreme Court

Dated: Brooklyn, New York
October 22, 1963

Affidavit of Aaron E. Koota Read in Support of Motion

SUPREME COURT

KINGS COUNTY

In the Matter of the Application of the

DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful refusal to testify before the said Grand Jury.

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

AARON E. KOOTA, being duly sworn, deposes and says:

I am Chief Assistant District Attorney of the County of Kings.

I make this affidavit at the direction of the Second Additional Grand Jury of the County of Kings for the October, 1963 Term of this Court, for an order adjudging one Richard I. Powell to be in contempt of Court for his contumatious and unlawful refusal after being duly sworn, to answer legal and proper interrogatories before said Grand Jury, pursuant to Section 750, Subdivision 5 of the Judiciary Law.

The facts and circumstances are as follows:

The Second Additional October, 1963 Grand Jury was duly empanelled and is presently in existence. Said Grand

Jury has commenced and is now conducting an investigation to determine whether the crimes of bribery and conspiracy were committed in the County of Kings in connection with the construction of one and two family homes in areas colloquially known as Mill Basin and Canarsie in said County.

Evidence unearthed by the personnel in our office indicates that many of these homes were shoddily constructed and in instances were built in direct violation to pertinent building code and laws and, therefore, now in violation of said statutes, codes and ordinances.

A domestic corporation known by the name of Donven Realty Corp., and its affiliated corporations, had constructed and sold some 300 one and two family houses in the Canarsie and Mill Basin area.

The witness herein, Richard I. Powell, is President of Donven Realty Corp., is its principal stockholder, its active manager and personally supervised the construction of said homes.

In or about the month of September, 1961, pursuant to a search warrant duly issued by a Judge of the County Court of Kings County, certain books, records and documents of Donven Realty Corp. were seized in connection with an investigation then being conducted by the District Attorney's Office of Kings County into the construction of said homes. A search of said books and records disclosed many notations in writing, indicating the payment of bribes to public officials in various departments of the City of New York. These notations were subsequently identified by the said Richard I. Powell as being in his handwriting.

Affidavit of Aaron E. Koota

On October 21, 1963, in the County of Kings, the said Richard I. Powell was duly subpoenaed as a witness before the said Grand Jury, then lawfully in existence and conducting the said investigation which I have outlined.

A quorum of the said Grand Jury as required by law was duly present at said session. The said witness Richard I. Powell appeared before said Grand Jury; he was duly sworn as a witness. The following seven interrogatories were thereupon put to the said Richard I. Powell:

1. Mr. Powell, on or about March 23, 1960 in the County of Kings, did you give $530 in cash to a public official in the Building Department as a payment on account for 53 houses on East 83rd Street in Kings County to permit you to use clay instead of cast iron pipes?

2. Mr. Powell, on or about April 6, 1960, did you give $530 cash to a public official in the Building Department in the County of Kings as a second payment on account for the same 53 houses on East 83rd Street?

3. Mr. Powell, on or about October 16, 1959, did you give to a public official in the Building Department in the County of Kings $350 cash covering 70 houses at five dollars each on East 85th Street on the north side of Avenue N?

4. Mr. Powell, on or about October 9, 1959 in the County of Kings, did you give $590 cash to a public official in the Building Department to permit an amendment of your plans and specifications to permit you to use orangeburg pipe instead of cast iron pipe covering jobs 166 to 194 and jobs 136 to 165, a total of 59 jobs on the basis of ten dollars a job?

5. Mr. Powell, on or about October 27, 1960 did you give $200 cash to a public official in the office of the Borough President's Office of the County of Kings, Borough of Brooklyn, for the grading of Avenue N from East 83rd Street to East 84th Street and also for grading on East 83rd Street between Avenues M and N?

6. Mr. Powell, on or about September 10, 1956 did you pay $500 cash to an official in the Building Department in the County of Kings, City of New York, as noted on Page nine of your cash disbursements book?

7. Mr. Powell, during the period from August, 1956 through April, 1960, did you make payments to officials in the Police Department of the City of New York approximating $3,000?

To each of these questions, the witness refused to answer on the ground that an answer might degrade or incriminate him.

Thereafter, pursuant to Section 2447 of the Penal Law, I as a prosecuting attorney appeared before said Grand Jury and questioning the said witness, expressly requested the said Grand Jury to order the said Richard I. Powell to give answer to the said seven questions.

A recess was then declared during which the District Attorney, the witness and the stenographer left the Grand Jury Room. Upon their return to the Grand Jury Room, the foreman of the said Grand Jury announced that the Grand Jury had taken a vote and had decided to accord immunity to the said witness and to direct him to answer the said questions as requested by the District Attorney.

Thereafter, I who was conducting said proceeding before said Grand Jury, expressly requested the foreman to direct the witness to answer said questions. The foreman thereupon did direct the said witness, Richard I. Powell, and ordered him to answer said questions. Said witness demurred at first, inquiring as to whether this immunity covered a judgment of this Court convicting him of the crime of Grand Larceny in the First Degree, from which an appeal had been taken by said witness, and which appeal was presently pending.

I advised the said witness that if his judgment of conviction were reversed by the Appellate Court, he would have immunity against further prosecution of the charge upon which he was convicted, but if the Appellate Court affirmed the conviction, the grant of immunity herein would not affect the judgment of conviction.

The said witness then inquired of me as to whether the immunity thus granted would protect him against Federal prosecution. I advised the witness that immunity protected him against prosecution for State crimes, but did not protect him against prosecution for any crimes which he may have committed under the Federal statutes, or against prosecution by the Federal Authorities for Federal crimes.

Moreover, I advised the witness that the immunity thus accorded to him by the Grand Jury meant that he would not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which in accordance with the order of the Grand Jury, he gave answer or produced evidence, and that no such answer given or evidence produced would be received against him upon any criminal proceeding.

Affidavit of Aaron E. Koota

Thereafter the witness persisted in his refusal to answer any of the seven questions propounded to him. The refusal of the said witness under the circumstances herein narrated, was contumatious and unlawful and constituted a criminal contempt of Court as specified in Section 750 of the Judiciary Law.

Said questions so propounded which said witness refused to answer, were pertinent, relevant and material to said Grand Jury investigation.

WHEREFORE, I respectfully pray that the annexed order be signed, and the relief granted for which no previous application has been made.

(Sworn to by Aaron E. Koota on October 22, 1963.)

Affidavit of Richard I. Powell Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of the

DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful refusal to testify before the said Grand Jury.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RICHARD I. POWELL, being duly sworn deposes and says:

I am the above named witness against whom the present contempt proceeding is brought.

I make this affidavit in response to the order to show cause herein dated October 22, 1963, signed by the Honorable Miles F. McDonald, Justice of the Supreme Court.

Upon the advice of my attorney, Maurice Edelbaum, Esq., I wish to state respectfully in this affidavit that, upon the return of the order to show cause before this Court on October 25, 1963, I shall make appropriate motions and/or requests for a plenary judicial trial of the factual issues of the charge of criminal contempt of court which has been brought against me. I shall also respectfully move for a full judicial hearing on the issues of law presented by this charge of criminal contempt of court. I also hereby re-

spectfully reserve the right to move for a trial by jury to try the charges of criminal contempt.

I am advised by my above mentioned attorney, Mr. Edelbaum, that, pending the holding of a trial and hearing before this Court, or before this Court and a jury, on the factual and legal issues of the charge of criminal contempt, I am within my legal and constitutional rights in refraining from any concession or admission in this affidavit concerning the factual assertions in the affidavit of Chief Assistant District Attorney Aaron E. Koota wherein Mr. Koota describes or recites the language of any interrogatories which were allegedly put to me by the Grand Jury on October 21, 1963, or wherein Mr. Koota describes or recites any alleged responses or alleged refusal to respond by me in reply to such interrogatories, or wherein Mr. Koota describes or recites any other alleged proceedings, statements or happenings before that Grand Jury.

However, I respectfully call the attention of this Court to the following statements in Mr. Koota's affidavit which, I am advised by my attorney, Mr. Edelbaum, are relevant to my defense against the charge of criminal contempt:— (1) The Grand Jury is investigating to determine whether the crimes of bribery and conspiracy were committed in connection with the construction of certain homes which, Mr. Koota states, were improperly and illegally constructed according to evidence unearthed by the personnel of Mr. Koota's office. (2) Mr. Koota states that records of the Donven Realty Corp. and affiliated corporations with which I am associated indicate the payment of bribes to public officials. (3) Mr. Koota lists seven interrogatories which he states were put to me by the Grand Jury to find

out whether I had paid bribes to public officials. (4) Mr. Koota states that I refused to answer each of those seven questions on the ground that an answer might degrade or incriminate me, that the Grand Jury thereafter accorded immunity to me, that I inquired whether this immunity covered my prior conviction of grand larceny in which an appeal is presently pending and whether the immunity would protect me against federal prosecution, that Mr. Koota advised me the immunity would not cover my grand larceny conviction unless the conviction were reversed on appeal and that the immunity would not cover federal criminal prosecution, and that thereafter I persisted in my refusal to answer the above mentioned seven questions.

I neither affirm nor deny the factual accuracy of any of the statements in Mr. Koota's affidavit as summarized by me in the above paragraph of this affidavit, and, again on the advice of my attorney, Mr. Edelbaum, I respectfully await the introduction of proof in a trial or hearing to establish just what was said and just what did occur in the Grand Jury.

Nevertheless I do now respectfully aver to this Honorable Court as follows:—(1) I have not intentionally, wilfully, or contumaciously committed any criminal contempt before the Grand Jury, nor have I been guilty of any contempt before the Grand Jury, nor have I entertained or felt any intent to commit any such contempt. (2) I fear that if I were to answer any such questions as those which were allegedly put to me by the Grand Jury, the result might be to degrade or incriminate me, especially in connection with the subject matter of my prior conviction for grand larceny which is presently being appealed. (3) I

fear that if I were to answer any such questions as those which were allegedly put to me by the Grand Jury, the result might be to degrade or incriminate me in regard to federal crimes and Federal criminal prosecution because the building construction work involved was work in which inspections by Federal government officials were taking place in connection with F.H.A. mortgage financing, so that any alleged bribery of such federal officials might expose me to Federal criminal prosecution. (4) I respectfully desire and hereby request a full trial before this Court, or possibly before this Court and a jury, in which I may have the opportunity to introduce evidence in support of the above statements which I have made in this paragraph of this affidavit.

I further respectfully aver as follows:—In April, 1963, while the State indictment against me for grand larceny was pending in Kings County, I was subpoenaed to appear before the Federal Grand Jury of the Eastern District of New York, where I was questioned about alleged payments to Federal government officials in connection with the building of homes in the Borough of Brooklyn as to which F.H.A. mortgage borrowing insurance was involved. In that interrogation by the Federal Grand Jury I invoked the Fifth Amendment privilege against self-incrimination, and I was excused by the Federal Grand Jury. I have been advised by my attorney, Mr. Edelbaum, that he was informed by Assistant United States Attorney Gruenwald, at the time of my above mentioned interrogation by the Federal Grand Jury in Brooklyn, that the Federal government had received information and had seen documents which purported to show that I had paid bribes to public

officials in connection with the aforementioned building of homes in Brooklyn. Mr. Edelbaum has further advised me that, in his professional judgment, belief and opinion, the only source from which the Federal government could have obtained such alleged information would have had to be the Rackets Bureau of the State District Attorney's Office in Brooklyn.

I hereby respectfully aver to this Court that the facts set forth in the statements which I made in my last above paragraph in this affidavit contribute strongly to my fear of Federal incrimination if I were to answer any questions of the type allegedly put to me before the State Grand Jury on October 21, 1963; and that, specifically, I fear collaboration between the State and Federal government prosecutive authorities to try to incriminate me both as to alleged Federal crimes and as to alleged State crimes of bribery of public officials and of conspiracy.

I further respectfully aver as follows:—Some months prior to the trial of my State grand larceny indictment, which was in March 1963, and while that indictment was pending, I was subpoenaed before the Kings County Grand Jury, where I was asked questions similar to those allegedly put to me by the State Grand Jury on October 21, 1963. I invoked my constitutional privilege against self-incrimination, and I was excused by that prior State Grand Jury, without any attempt by that Grand Jury to accord me immunity.

I hereby respectfully aver to this Court that the facts set forth in the statements which I made in my last above paragraph in this affidavit, still further contribute strongly to my fear of both Federal and State incrimination be-

cause the present renewal of the efforts of the State Grand Jury to interrogate me, this time with the addition of the compulsory device of immunity, shows to my mind an attitude of relentl ssness on the part of the State Grand Jury and prosecutors, a relentlessness of determination on their part to force me to incriminate myself even though a prior State Grand Jury decided to leave me in peace without forcing immunity upon me, and even though I am presently under conviction for alleged State crimes which relate in part to this same subject matter, and even though this renewed effort to force me to incriminate myself would involve also an extreme danger of Federal incrimination and not merely of State incrimination.

If I am granted a trial or hearing before this Court, or possibly before this Court and a jury, I shall introduce evidence to establish my averments in the last several preceding paragraphs in this affidavit.

For all of the reasons and on the basis of all of the facts which I have presented in this affidavit, I respectfully request and pray this Court to grant me a full trial or hearing of all of the issues of law and fact which relate to the charge of criminal contempt that has been brought against me.

(Sworn to by Richard I. Powell on October 24, 1963.)

Affidavit of Maurice Edelbaum Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of the

DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful refusal to testify before the said Grand Jury.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MAURICE EDELBAUM, being duly sworn, depose and says:

I am the attorney for the above named witness, Richard I. Powell, against whom the within contempt proceeding is brought.

I make this affidavit in support of Mr. Powell's response to the order to show cause herein dated October 22, 1963, signed by the Honorable Miles F. McDonald, Justice of the Supreme Court. Said order to show cause is returnable October 25, 1963.

I have read (and indeed I have of course assisted in the preparation of) the affidavit of Richard I. Powell with which this affidavit is submitted, and I hereby aver that all of the several statements in Mr. Powell's affidavit which recite or which refer to advice or information given by me

to Mr. Powell are correct and true to my personal knowledge.

One of the items mentioned in Mr. Powell's affidavit relates to his appearance before a Federal Grand Jury in the Eastern District of New York in April 1963. On that occasion Assistant United States Attorney Gruenwald stated to me that his Office had information and had seen documents which purported to show that Mr. Powell had paid bribes or had made "pay-offs" to public officials in connection with the home building operations of his companies in Brooklyn. On information and belief, I hereby aver that the only source of such information or documents would have had to be the Rackets Bureau of the Office of the District Attorney of Kings County.

Together with this affidavit and the accompanying affidavit of Richard I. Powell, there is being submitted to the Court a memorandum of law in support of Mr. Powell's response and return to the order to show cause. The requests and prayers in said memorandum of law are hereby adopted by me as a part of this affidavit.

(Sworn to by Maurice Edelbaum on October 24, 1963.)

Hearing of October 25, 1963 on Application to Adjudicate Witness for Contempt of Court

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of the DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful refusal to testify before the said Grand Jury.

(3316/63)

Brooklyn, N. Y.
October 25, 1963

Before:

HON. MILES F. McDONALD,

Justice.

Appearances:

AARON E. KOOTA, Esq.
For the People

MAURICE EDELBAUM, Esq.
Attorney for the Defendant

EVELYN L. SHANSER, CSR,
Court Reporter

Hearing of October 25, 1963 on Application to Adjudicate Witness for Contempt of Court

The Clerk: People against Richard I. Powell.

Mr. Koota: May it please your Honor, this is an application made on behalf of the Second Additional October 1963 Grand Jury to punish a witness, one Richard I. Powell, appearing before it in an investigation for criminal contempt of court pursuant to Section 750 Subdivision 5 of the Judiciary Law for his wilful and contumacious refusal to answer personal questions before the Grand Jury.

This matter, the Court may recall, was before it on Monday, October 21st, of this week, when an application was made orally. Upon the suggestion of the Court, we made this application on written papers.

An Order to Show Cause was obtained, and a copy served upon the respondent.

The Court: I have his replying affidavit in brief now which he furnished me this morning and with which I am familiar.

Mr. Koota: Very well, sir. This Grand Jury began an investigation to determine whether the crimes of conspiracy and bribery were committed in the County of Kings in connection with the construction of one and two-family homes in the Mill Masin and Canarsie areas of Brooklyn. This witness is the president of Donvan Realty Corporation. Donvan Realty Corporation constructed some 300 homes in that area.

In the course of that investigation, as it appears by the moving affidavit, a search warrant was issued by a Judge then of the County Court of Kings County, permitting the District Attorney to seize the books, records and documents of the respondent, of Donvan Realty Corporation and two affiliated corporations.

Hearing of October 25, 1963 on Application to Adjudicate Witness for Contempt of Court

As a result of the execution of this search warrant, the obtaining of these records, we found notations in the various records indicating, in the handwriting of the witness, Richard I. Powell, indicating payments in the nature of bribes to public officials in various departments of the City of New York.

This witness now is called before the Grand Jury to testify concerning that. Seven questions were put to him. These questions are set forth in the Order to Show Cause or the affidavit in support of it. These questions are as follows:

(1) "Mr. Powell, on or about March 23, 1960, in the County of Kings, did you give $530 in cash to a public official of the Building Department as a payment on account for 53 houses on East 83rd Street in Kings County to permit you to use clay instead of cast iron pipes?

(2) "Mr. Powell, on or about April 6, 1960, did you give $530 cash to a public official of the Building Department of the County of Kings as a second payment on account for the same 53 houses on East 83rd Street?

(3) "Mr. Powell, on or about October 16, 1959, did you give to a public official in the Building Department in the County of Kings $350 cash covering 70 houses at $5 each on East 85th Street on the north side of Avenue M?

(4) "Mr. Powell, on or about October 9, 1959, in the County of Kings, did you give $590 cash to a public official of the Building Department to permit that amendment of

your plans and specifications to permit you to use Orangeburg Pipe instead of cast iron pipe covering jobs 166 to 194 and jobs 136 to 165, a total of 59 jobs on the basis of $10 a job?

(5) "Mr. Powell, on or about October 27, 1960, did you give $200 cash to a public official in the Office of the Borough President's office of the County of Kings, Borough of Brooklyn, for the grading of Avenue N from East 83rd Street to East 84th Street and also for grading on East 83rd Street between Avenues M and N?

(6) "Mr. Powell, on or about September 10, 1956, did you pay $500 cash to an official in the Building Department in the County of Kings, City of New York, as noted on page 9 of your cash disbursements book?

(7) "Mr. Powell, during the period from August 1956 through April 1960 did you make payments to officials of the Police Department of the City of New York approximating $3,000?"

To each of these questions the respondent Richard I. Powell refused to answer, stating that an answer might degrade or incriminate him.

Thereupon, pursuant to Section 2447 of the Penal Law, immunity was bestowed upon this witness. Certain objections were made by him to answering among which was, first, whether the grant of immunity covered a conviction in this court whereby this respondent had been convicted of crimes of grand larceny and which he stated was presently on appeal to the Appellate Division.

Hearing of October 25, 1963 on Application to Adjudicate Witness for Contempt of Court

To that I stated, and I might incidentally state to the Court that I intend to offer in evidence the minutes of the Grand Jury proceedings here before I conclude my argument—and to that I stated that in the event the Appellate Division reversed his conviction, then the grant of immunity now given to him would effectively prevent further prosecution of the grand larceny charge.

The Court: I don't know whether it would prevent prosecution but it prevents the use of any evidence at this time.

Mr. Koota: At any rate, I stated to him further that in the event the Appellate Division affirmed the judgment and the judgment was subsequently affirmed perhaps in a higher court, then he did not receive immunity against the judgment on the crime of grand larceny.

He inquired further whether the immunity granted covered immunity against possible Federal prosecution. I stated immunity granted did not cover immunity against prosecution by a Federal official for a Federal crime.

The Foreman directed thereupon the witness to answer the questions, which is the procedure set forth in Section 2447. The witness refused deliberately, intentionally and I say contumaciously to refuse to answer the questions, whereupon an application was made before your Honor.

I therefore ask that your Honor either direct the witness to return to the Grand Jury and answer these questions or, upon his refusal to do so, summarily to punish him for contempt.

The Court: I will hear Mr. Edelbaum.

Mr. Koota: I should like now to offer in evidence the

testimony of the Grand Jury of October 21, 1963 which covers not only the testimony of this witness but of two other witnesses of the District Attorney's office showing the nature of the investigation. I will give Mr. Edelbaum a copy of these minutes.

Mr. Edelbaum: May I look at them first?

The Court: Certainly. Mr. Edelbaum, is your client here?

Mr. Edelbaum: Oh, yes.

The Court: Better have him come up.

Mr. Edelbaum: Mr. Powell, will you come up, please?

(Respondent comes forward.)

The Court: For the record, Mr. Powell, you have been here while all the proceedings have been taken?

The Respondent: Yes, sir.

Mr. Edelbaum: I have read it, your Honor. I have no objection.

The Court: Let it be marked.

(Marked People's Exhibit 1 in Evidence.)

Mr. Koota: May the record show that I have a copy for Mr. Edelbaum's use.

The Court: It would seem to me that there is not much necessity for your arguing, that I agree. First, you are entitled to a hearing and in that hearing you are entitled to subpoena witnesses. Second, you are entitled to the presumption of innocence.

Mr. Edelbaum: Right.

The Court: Your client's guilt, if any, must be established beyond a reasonable doubt.

Mr. Edelbaum: Right.

The Court: That he is entitled to a jury trial, I do not agree. There is no law at this time that says he is. There may be in the United States Supreme Court.

Mr. Edelbaum: I will except to that.

The Court: On that point you have an exception.

When can we set the hearing? It must be prompt because this investigation has been going on for some time. Time is of the essence and, while he is entitled to a hearing, he is entitled to a reasonable time to prepare. He has had a week and I would expect to set this down very promptly.

Mr. Koota: May I be heard?

With respect to the observations of the Court with which I respectfully dissent, it has been held, if the Court pleases, that a proceeding of this nature is a civil proceeding even though it seeks to punish for criminal contempt. The principles applicable in the civil proceeding apply and not a criminal proceeding. Therefore we need not establish guilt beyond a reasonable doubt nor is there any presumption of innocence.

The Court: You can object.

Mr. Koota: However, the hearing contemplated under Section 750 is exactly what is taking place now.

The Court: I agree. I think there are certain issues—the primary issue in this particular case, the one ground upon which he may successfully defend, is that you are in a conspiracy with other authorities. That he is entitled

to prove. That is the only real basis. The rest of his arguments have no merit above that one where he has got merit, if he can prove it.

Let me say this—when can we have the hearing?

Mr. Koota: Can your Honor limit it to that issue?

The Court: No. I will make rulings on the other points in a minute.

Mr. Koota: Monday I would like to have it, Judge.

Mr. Edelbaum: May I say something, Mr. Koota, please? Your Honor, I am in the midst of finishing a capital case which I expect—

The Court: What is the status of that case?

Mr. Edelbaum: I expect that the case should be concluded before Wednesday of next week. I'd like this set down for Thursday. I will be ready at that time. I will have an opportunity to subpoena my witnesses.

The Court: Thursday I have hearings and Friday I have to attend a convention of judges in Boston and if it was adjourned it might cause trouble. I will set it for Wednesday at 2:00 P.M.

Mr. Edelbaum: Could we set it at 4:00 P.M., your Honor, so in case I am still engaged—

The Court: How long do you expect this hearing to take?

Mr. Edelbaum: An hour or more. If we are not finished, your Honor could do whatever is proper at that time. All I want to do is finish this capital case.

The Court: All right. Wednesday at four.

Your next request, as I gather, is that I shouldn't follow the determination in *Knapp* v. *Schweitzer*, that I should

make some law in that contrary to the law of the United States Supreme Court?

Mr. Edelbaum: I will argue that at the conclusion of the hearing.

The Court: I think you may as well confine your issues now and I perfectly intend to follow the law as it now exists. *Knapp* v. *Schweitzer* controls. With respect to *Feldman* v. *The United States,* I think that perhaps that ought to be reversed but that does not affect this Court. That affects the prosecution in the Federal Court and it seems to me, as I ruled in another case, that this testimony, if given, is not voluntarily given and therefore may not be used. It is done under legal compulsion. It is in effect coerced and therefore may not be used, but *Knapp* v. *Schweitzer* is the law and it will continue to be the law until it is reversed by the Court and I will apply it.

Mr. Edelbaum: But, your Honor, I, as an advocate representing a defendant, in view of the fact that I was alerted that the Supreme Court has granted certiorari, I must make a record.

The Court: You are perfectly entitled to make the record. I am stating this now so that you have made your record. *Knapp* v. *Schweitzer* I intend to follow.

Mr. Edelbaum: The only thing I ask you at this time—

The Court: There was another point you raised here.

Mr. Koota: Good faith, I think, Judge.

The Court: That is a question of fact for the determination at the time of the trial.

Mr. Edelbaum: That is correct, your Honor.

The Court: There was another contention that you

made. The other we dealt with on the question of fact for which you are having a hearing.

Mr. Edelbaum: That's right.

May I have the answering affidavit of Richard I. Powell considered as a formal answer to this proceeding?

The Court: Yes.

Mr. Edelbaum: Thank you.

The Court: Four o'clock on Wednesday.

Mr. Koota: May we make it at two in the event Mr. Edelbaum is finished?

The Court: Yes. I will wait and we will complete this on Wednesday night.

The Clerk: Wednesday, October 30th at 2:00 p.m.

(Whereupon the hearing was adjourned until Wednesday, October 30, 1963 at 2:00 p.m.)

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of the DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful refusal to testify before the said Grand Jury.

(No. 3316/63.)

Brooklyn, New York
November 7, 1963

Before:

HON. MILES F. McDONALD,

Justice.

Appearances:

AARON E. KOOTA, Esq.
For the People

MAURICE EDELBAUM, Esq.
Attorney for the Defendant

EVELYN L. SHANSER, C.S.R.
Court Reporter

The Court: Mr. Koota and Mr. Edelbaum, let me review the previous proceedings to be certain that I understand exactly where we are.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court

At the previous hearing, the District Attorney made a statement upon which he based his application for contempt. Am I correct?

Mr. Koota: And on the motion papers.

The Court: At that time Mr. Edelbaum raised the following issues: that he was entitled to a full hearing, which I granted; that you were entitled to subpoena witnesses, which I stated you were; that you were entitled to the benefit of the presumption of innocence and that your client must be found guilty beyond a reasonable doubt.

The District Attorney opposed that saying this was a civil proceeding. I stated that despite the fact that it was a civil proceeding, I intended to apply both of those principles and I will apply both of those principles.

You argued further that you were entitled to a jury trial, which I denied.

You are here now because there were two other issues raised, that the refusal to answer was not wilful and he was at all times acting in good faith and without criminal intent and to compel him to answer would be a violation of his constitutional rights.

For that purpose, for a hearing on the last two issues, we are here today; is that correct?

Mr. Edelbaum: Absolutely correct.

The Court: The case rests with you. You may proceed.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court
Raymond B. Grunewald—for Respondent—Direct

RAYMOND BERNHARD GRUNEWALD, called as a witness by the Respondent, having been first duly sworn by the Clerk of the Court, and stating his address as 5628 213th Street, Bayside Hills, Queens County, testified as follows:

Direct Examination by Mr. Edelbaum:

Q. Mr. Grunewald, are you an attorney and counselor-at-law? A. Yes, sir, I am.

Q. Do you hold any public position? A. Yes, sir, I do.

Q. Will you tell his Honor what public position you hold? A. I am an Assistant United States Attorney for the Eastern District of New York.

Q. Since what date have you been such an Assistant United States Attorney? A. Since the 2nd of August 1961.

Q. After September 16, 1961, was there placed in your charge an investigation concerning the respondent Richard I. Powell and the Donvan Realty Corporation? A. Yes.

Q. Did there come a time when you requested or subpoenaed the respondent Richard I. Powell as a witness before a Grand Jury of this district? A. Yes.

Q. Eastern District of New York? A. Yes.

Q. Prior to the time that he was called as a witness before the Grand Jury of the Eastern District of New York, did you have any conferences with Mr. Aaron Koota, Chief of the Rackets Bureau at that time, of the District Attorney's office of Edward S. Silver, concerning the subject matter of your investigation? A. If you bear with me for a moment, Mr. Edelbaum—I have to think about it. This would be prior to the Grand Jury?

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court Raymond B. Grunewald—for Respondent—Direct

Q. Prior to Mr. Powell being called as a witness before the Grand Jury. A. I don't recall—I recall speaking to Mr. Koota but I don't recall whether it was before or subsequent.

The Court: Let me ask you this: did you learn that an investigation was simultaneously being conducted by the District Attorney's office in Kings County or did you merely inquire to find out if there was an investigation?

The Witness: I truthfully don't know—I don't know.

By Mr. Edelbaum:

Q. Tell me, Mr. Grunewald, were you at any time—withdrawn. Did you at any time inspect certain memoranda allegedly in the handwriting of the respondent Richard I. Powell which was in the hands of the District Attorney's office of Kings County?

The Court: Mr. Edelbaum, I want you to fix the date. I think it becomes important with respect to the institution of proceedings before the Grand Jury of the County.

Mr. Edelbaum: Yes, your Honor.

The Witness: In this regard, before any question is put to me, your Honor, of course, by virtue of my position, I'd like to draw to the Court's attention the 5 U.S. Code Section 22.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court
Raymond B. Grunewald—for Respondent—Direct

The Court: I don't have it before me and I don't know it by number.

The Witness: I have it (handing to Court).

With reference to privileged material and information.

The Court: I have this. Go ahead.

The Witness: Pursuant to instructions from the Department of Justice in Washington, D.C., I am instructed not to disclose matters or material contained in the government's files.

The Court: He hasn't asked you about that.

The Witness: That is the only thing I wish to draw to the Court's attention.

The Court: I will rule on that point if it comes up but so far he has not asked you to produce anything or give any information from the government's files.

Mr. Koota: I didn't hear what you said. Did you say with respect to the government's funds?

The Witness: Files.

By Mr. Edelbaum:

Q. Mr. Grunewald, do you recall the occasion when Mr. Powell responded to a subpoena to appear—

The Court: You haven't gotten an answer to the previous question. Do you want to withdraw it?

Mr. Edelbaum: I will withdraw it at this time.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court Raymond E. Grunewald—for Respondent—Direct

Q. Do you recall the occasion when Mr. Richard I. Powell was called as a witness before the Grand Jury? A. Yes, I do.

Q. Were you in charge of that investigation? A. Yes, I was.

Q. Do you recall having a conference with Mr. Edelbaum, the attorney for Mr. Powell, prior to him appearing before the Grand Jury? A. Yes.

Mr. Koota: Is that you or your son, Mr. Edelbaum?

Q. Mr. Maurice Edelbaum. A. Yes, I do.

Q. Was Mr. Powell present at that time with Mr. Edelbaum? A. I don't think he was present at all times but I believe he was present for part of the time.

The Court: When he was called before the Federal Grand Jury, was he asked to sign a waiver of immunity at that time?

The Witness: I believe he was.

The Court: Did he sign a waiver of immunity?

The Witness: No.

By Mr. Edelbaum:

Q. Prior to him actually appearing before the Grand Jury, did you inform the respondent and his lawyer that you had seen certain slips in his handwriting that was in the hands of the District Attorney of Kings County? A. I don't recall that.

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Q. Will you deny that you did or did not? A. I don't deny it, I said I don't recall.

Q. Had you seen such slips before Mr. Powell was called before the Grand Jury and had you seen them at the office of the District Attorney of Kings County or anywhere else had they been brought to you? A. At this time, your Honor, I have this problem regarding information contained in the government's files.

The Court: It is not a matter in the government's files. He is asking you about matter in the District Attorney's files, the District Attorney of Kings County.

A. Did I see them over in the D.A.'s office in Kings County?

Q. Or were they shown to you or copies shown to you? A. In the District Attorney's office in Kings County?

Q. Yes. A. No.

Q. Do you have any members of the Federal Bureau of Investigation that assisted you in this investigation? A. Yes.

Q. Were you shown any reports that they had examined such records, such memoranda, in the office of the District Attorney of Kings County?

Mr. Koota: If it please the Court,—

A. I think I must claim executive privilege as to the reports. Those are government's reports you are referring to, Mr. Edelbaum, I believe.

The Court: I think they do. As I read the instructions, you are entitled to a recess in order to seek the advice of the Attorney-General before an adverse ruling is made. I will give you the necessary recess to make that. In the meantime I will reserve decision on your objection and let Mr. Edelbaum go along another line. We will come back to that a little later.

Mr. Koota: If your Honor please, I may be in a position to make certain concessions on the record which may make Mr. Grunewald's testimony unnecessary. I am fully familiar with whatever happened here. I personally participated in all of it. I will be perfectly willing—Mr. Seidman did too—to have Mr. Seidman called as a witness.

The Court: Perhaps if you confer with Mr. Edelbaum. Take a five-minute recess. Perhaps you can arrange a stipulation and then you can advise the Court to that effect. Meanwhile I will try and find out about this other matter. Five minute recess.

(Whereupon a brief recess was taken.)

(Hearing resumed.)

Mr. Edelbaum: May I, your Honor, interrupt Mr. Grunewald's testimony by calling another witness at this time, with leave to recall Mr. Grunewald?

The Court: Yes.

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Aaron E. Koota—for Respondent—Direct

Mr. Edelbaum: Mr. Koota, will you take the witness stand?

Aaron E. Koota, called as a witness by the Respondent, having been first duly sworn by the Clerk of the Court, and stating his address as 4288 Bedford Avenue, Brooklyn, testified as follows:

Direct Examination by Mr. Edelbaum:

Q. Mr. Koota, you are an attorney and counselor-at-law? A. I am.

Q. Do you hold any position, public position? A. I do.

Q. What position do you hold? A. I am Chief Assistant District Attorney, Kings County.

Q. In August of 1961, did you hold any position with the District Attorney's office of Kings County? A. Yes, I was Assistant District Attorney in charge of the Rackets Bureau.

Q. In connection with your official duties as Assistant District Attorney in charge of the Rackets Bureau, did you have occasion to subpoena the Respondent Richard I. Powell before the Kings County Grand Jury? A. He appeared before the Grand Jury, I presume it was pursuant to subpoena.

The Court: Was that 1961?

The Witness: August of 1961, your Honor.

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Aaron E. Koota—for Respondent—Direct

Q. Did he produce certain books before that August Grand Jury? A. He did.

Q. Subsequent to that time, did you, in your official capacity as an Assistant District Attorney of Kings County, secure a search warrant for certain records and papers in the office of the Donvan Realty Corporation of which the Respondent was an officer? A. Our office did. I don't recall whether I personally did.

Q. Was that search warrant executed? A. It was.

Q. Pursuant to that search warrant, did you get certain papers? A. We did.

Mr. Edelbaum: May I call for the production of People's Exhibit B which was produced before the Grand Jury of Kings County on the 21st day of October, your Honor, which is the subject of this proceeding, at the time that Mr. Powell was called as a witness?

The Court: All right.

Q. I show you a brief case. Was that brief case marked and the contents thereof marked as an exhibit before the Grand Jury on October 21, 1963? A. I think it was marked as an exhibit for identification only.

Q. Does that contain certain memoranda or papers allegedly in the handwriting of the Respondent Richard I. Powell? A. I believe it does, yes.

The Court: This was obtained as a result of a search warrant?

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The Witness: It was, your Honor.

The Court: And it was in the possession of the District Attorney prior to the time it was introduced in evidence before the Grand Jury?

The Witness: It was, your Honor.

The Court: It was not produced and offered in evidence—produced by the defendant and not offered in evidence for the first time before the Grand Jury?

Mr. Edelbaum: That's correct, your Honor.

The Court: It was in their possession before?

Mr. Edelbaum: It was in their possession before October 21, 1963.

The Witness: In connection with the trial which this Respondent was the defendant—

The Court: In connection with the trial. The first time you saw it was it in connection with a Grand Jury investigation or not?

The Witness: Yes, sir, in connection with the Grand Jury investigation.

The Court: You saw it for the first time in connection with the Grand Jury investigation?

The Witness: Yes, sir.

The Court: Was it obtained as a result of a search warrant?

The Witness: Yes, your Honor.

The Court: Then the first time you saw it was not in the Grand Jury?

The Witness: No, I had seen it before.

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Aaron E. Koota—for Respondent—Direct

The Court: You had seen this or had it in your possession prior to the Grand Jury.

By Mr. Edelbaum:

Q. As a matter of fact, you had it in your possession and you saw it in August or September of 1961; is that right? A. I think it was September of 1961 we saw it.

Q. After you saw it, did you examine it? A. Yes.

Q. Do you have an accounting division of the Rackets Bureau? A. Yes.

Q. Did you cause the accountants to make a survey of these slips? A. I did.

Q. Did they make certain reports to you? A. They did.

Q. At that time, in September of 1961, did you invite the United States Attorney for the Eastern District of New York to attend a conference at the District Attorney's office of King's County? A. The District, Mr. Silver, did.

Q. Did Mr. Hoey respond to that invitation? A. He did.

Q. Did he attend a conference? A. He did.

Q. Where did the conference take place? A. The office of Mr. Silver in the Municipal Building.

Q. Were you present there at that time? A. I was.

Q. Did anybody from the United States Government appear in addition to Mr. Hoey, the United States Attorney for the Eastern District? A. Mr. Moran who was some superior official, I think, in the Federal Housing Administration.

Q. Were they advised of the contents—

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Mr. Edelbaum: May we have this marked as an exhibit in this case, your Honor?

The Court: Mark it as an exhibit, only the exterior.

(Briefcase marked Respondent's Exhibit A for identification.)

By Mr. Edelbaum:

Q. Did you say the Respondent's Exhibit A for identification contained certain memoranda allegedly in the handwriting of the Respondent Richard I. Powell which were seized under the search warrant issued out of the Supreme Court, I assume, is that right?—County Court? A. Issued out of the then County Court. Yes, this Exhibit A for identification does contain memoranda in Mr. Powell's handwriting.

Q. Was the contents of that briefcase, the memoranda, discussed with Mr. Hoey and Mr. Moran? A. In a general way only.

Q. Subsequent thereto, did Mr. Grunewald, the Assistant United States Attorney, who was the last witness here, appear at the office of the District Attorney's office of Kings County? A. He did.

Q. Did he appear there with two agents of the Federal Bureau of Investigation? A. My best recollection is I think on the first occasion he appeared alone but I am not too sure of that. A subsequent occasion he came with two

individuals attached to the Federal Bureau of Investigation.

Q. Did you cause certain reports to be made up by your accounting division of the District Attorney's Office of Kings County concerning the contents of Respondent's Exhibit A for identification? A. I did.

Q. May we have those reports produced? A. I have the reports in my hand now.

Q. Did those reports disclose some alleged payments— A. Pardon me, I didn't—

Q. Did those reports disclose some alleged payments to officials of the United States Government?

The Court: I don't think the question is properly framed. I don't believe these disclosed anything. This was an alleged, I presume, tabulation of something that someone else claimed.

Mr. Edelbaum: That's right.

A. That is what bothered me about answering the question.

Mr. Edelbaum: I will take that correction and thank your Honor for it.

Q. Do these reports contain an alleged compilation of certain alleged payments made to officials of the United States Government? A. I can't answer that. I can't answer it categorically. All I can say is that that report contained payments and names who were identified as being with Federal agencies, dates and amounts.

Q. Thank you. Were copies of these reports turned over to Mr. Grunewald or Mr. Hoey or members of the Federal Bureau of Investigation?

The Court: I presume you don't object to this procedure, Mr. Edelbaum?

Mr. Edelbaum: No, as a matter of fact, in order to proceed more expeditiously, I think I have gotten from Mr. Koota as much as I want at this time and I will now call Mr. Seidman who, I understand, is familiar with what thereafter occurred.

Mr. Koota: May I ask myself some questions, Judge?

The Court: Yes. No, you may make a statement. If Mr. Edelbaum finds any objection, he may move to strike it.

Mr. Edelbaum: I am satisfied to have him make a statement as long as I can examine him on the statement.

The Witness: The investigation into the payments made by Mr. Powell was, of course, under the jurisdiction of the District Attorney, Mr. Silver. More immediately, I, being assistant in charge of the Rackets Bureau, conducted the investigation but the actual mechanics of the investigation itself, the examination of papers, was under the immediate supervision of Assistant District Attorney Irving Seidman and the accounting staff of the Rackets Bureau. Mr. Seidman would report to me and I, in turn, would report to the District Attorney. At no

time after certain information was disclosed to the Federal authorities did we have any contact with the Federal authorities, did we collaborate in any way, either in their investigation or in our investigation. At no time did we consult with them as to what they were doing. They never consulted with us as to what we were doing. Their investigation was confined, and the only papers turned over to them were the notations which concerned the Federal Housing Authority and the Veterans' Administration.

That was a matter which was beyond the jurisdiction of the Kings County District Attorney's Office and our investigation, that is, the investigation by the Kings County District Attorney's Office, was entirely without the purview of the Federal authorities. We found notations of payments allegedly made to Federal authorities and we turned them over to the Federal authorities and that ended the matter, so far as our office was concerned.

By Mr. Edelbaum:

Q. Mr. Koota, in addition to what you testified to, was this defendant indicted in the Supreme Court of Kings County on the charge of Grand Larceny in the First Degree and obtaining property, two counts? A. Yes, the second count was fraudulently inducing the execution of a mortgage—I think that was the second count. The first count was Grand Larceny.

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Aaron E. Koota—for Respondent—Direct

Q. Were you in charge of the prosecution? A. I was.

Q. Had the Respondent been called before the Grand Jury prior to the trial of that indictment? A. My best recollection is he was called in August as an officer of Donvan Realty Corporation, August of 1961, where he produced books, simply identified them and was excused.

Q. Subsequently was he not asked to appear before the Grand Jury and at that time were you not advised by his attorney Maurice Edelbaum, that he would claim his constitutional privilege against self-incrimination and he was not called before the Grand Jury? A. I am not sure but I think that was probably so, Mr. Edelbaum. I wouldn't dispute that.

Q. Subsequently to that time—at that time, when you were advised that he would claim his constitutional privilege against self-incrimination, you knew about the contents of Respondent's Exhibit A for identification, is that right? A. As I say, I am not too certain that what you said in your last question did occur. But—

Q. You won't dispute that? A. I won't dispute it. I can say this, that if I asked Mr. Powell to appear before the Grand Jury after the search warrant in September 1961 had been executed, of course I knew that time that we had these notations in his handwriting.

Q. Subsequently did you participate in the prosecution of that indictment in this court before the Hon. Justice Irwin J. Shapiro? A. I did.

Q. Was the defendant convicted? A. He was.

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The Court: Let the record show that there is an appeal pending sub judice at the present time in the Appellate Division, 2nd Department.

Q. And that the defendant is presently at liberty under a certificate of reasonable doubt under said conviction? A. Under that conviction, yes.

Q. When the Respondent appeared on October 21, 1963, is it not a fact that at that time he asked you whether or not the Grand Jury was prepared to give him immunity from Federal prosecution? A. My best recollection is that he was.

The Court: Didn't we have the minutes? Offer those in evidence.

Mr. Edelbaum: Yes, your Honor.

The Court: The District Attorney will have no objection.

Mr. Edelbaum: No further questions.

I offer that in evidence as Respondent's Exhibit B.

The Court: The minutes of the Grand Jury testimony or claims of this Respondent.

Mr. Seidman: I believe this Court has a copy of those minutes in the file already.

(Copy of Grand Jury minutes previously marked People's Exhibit 1 in evidence, as of October 25, 1963.)

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court
Irving P. Seidman—for Respondent—Direct

IRVING P. SEIDMAN, called as a witness by the respondent, having been first duly sworn by the Clerk of the Court, and stating his address as 3310 Avenue H, Brooklyn, testified as follows:

Direct Examination by Mr. Edelbaum:

Q. Mr. Seidman, you are an Assistant District Attorney in the office of the Rackets Bureau of Mr. Edward Silver, the District Attorney of Kings County; is that right? A. I am.

Q. Did you have anything to do with the investigation of alleged payoffs by the Respondent Richard I. Powell as an officer of the Donvan Realty Corporation? A. I did.

Q. At any time during your services in connection with this investigation, did you have occasion to meet with and confer with Mr. Grunewald, the Assistant United States Attorney in charge of investigation of the United States Attorney's Office for the Eastern District of New York? A. I did.

Q. Will you tell his Honor where that was and how many occasions and what was done at that time? A. To the best of my recollection, if I can give you the whole chronology of events which led up to this, on September 16th of 1961, our office executed a search warrant signed by Hon. Judge Hyman Barshay of the County Court and pursuant to that search warrant obtained the records which were offered in evidence here.

Subsequent thereto, our accounting staff analyzed and prepared reports concerning these writings. In February

of 1962, in the beginning of the month, I believe it was February 4th, Mr. Silver and Mr. Koota met with Mr. Hoey and Mr. Moran concerning that portion of the notations that related to Federal agencies.

The next day Mr. Grunewald and a gentleman by the name of Mr. Costa and two F.B.I. agents came to our office—

Mr. Koota: Mr. Costa is the chief of the Criminal Division in Mr. Hoey's office.

Mr. Edelbaum: I stipulate that.

A. Yes. Came to our office of the Rackets Bureau in order to confer with respect to the notations as they related to the Federal agencies.

I informed Mr. Grunewald—Mr. Costa left, did not remain during the entire conference: I conferred with Mr. Grunewald in the presence of two F.B.I. agents and informed him of the notations as they related to the Federal agencies. We also made available to the Federal agents, I don't recall whether it was on that day or a short time thereafter, copies of these accounting reports as they relate to the Federal matters.

A substantial time went by and I believe sometime during the early part of 1963 or the latter part of 1962, I received a phone call from Mr. Grunewald at which time he asked whether our office would make available to him the original slips of papers as they relate to the Federal agencies.

I told him I would have to confer with my superiors. I

conferred with Mr. Koota and he informed me that I was to make available to the Federal authorities those papers that contained notations with respect to the alleged payment to employees of the Federal agencies, that I was not to make anything else available to them.

I phoned Mr. Grunewald and told him that we would be able to make such slips of papers available to him and he informed me that he would send an F.B.I. agent by the name of Shanley over to our office to pick up these papers.

Myself, I and Mr. Rabinowitz, who is an accountant in our office, then obtained the folder which has been marked for identification from Mr. Buchbinder, our chief investigator, and culled through the slips of papers following the accountant's report, seeking to take those slips which bore notations of payments to employees of Federal agencies. We separated those slips and Mr. Shanley, F.B.I. agent, came to our office the following day and we made those slips available to him.

He then took them with him. A substantial time then went by, and I was contacted by agent Shanley who informed me that his office had no further use for the slips of papers and that he would like to return them to us.

We made arrangements and Mr. Shanley returned the slips of papers to us. To the best of my recollection, that is my dealings with Mr. Grunewald or anyone else who was in the official employ of the Federal government.

Mr. Edelbaum: I have no further questions of this witness.

The Court: Step down.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court Raymond B. Grunewald—for Respondent—Direct

(The witness was excused.)

Mr. Edelbaum: Mr. Grunewald, will you resume the witness stand?

RAYMOND BERNHARD GRUNEWALD, having been prevously sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. Edelbaum (Continued):

Q. Mr. Grunewald, did Mr. Powell appear before the Grand Jury? A. Yes, he did.

Q. Was he asked certain questions concerning certain slips given to your office by the District Attorney's Office of Kings County; yes or no? A. If you permit me, I think I can qualify that to the extent—

The Court: Answer the best you can.

A. He was asked questions regarding any dealings he may have had with FHA personnel, et cetera.

Q. And that information had been disclosed to your office by the District Attorney's Office of Kings County; is that right? A. We had received certain information from the D.A.'s Office, yes.

Q. Did Mr. Powell at that time avail himself of his constitutional privilege against self-incrimination? A. Yes.

Q. Was he excused at that time when he did that? A. Yes.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court Raymond B. Grunewald—for Respondent—Direct

Mr. Koota: May I ask a question, your Honor?

The Court: Yes.

By Mr. Koota:

Q. Mr. Grunewald, the Federal authorities were conducting an investigation with respect to Mr. Powell, were they not? A. Yes.

The Court: Conducting an investigation with respect to Mr. Powell or with respect to employees of Federal agencies?

The Witness: Both.

The Court: In the interrogation of Mr. Powell before the Federal Grand Jury, was he asked with reference to payments alleged to have been made to persons other than Federal employees?

The Witness: I don't believe so, sir.

By Mr. Koota:

Q. At any time in the course of the investigation by the Federal Government, was the District Attorney's Office of Kings County consulted as to the method of Federal procedure or what should be done? A. No.

Q. Did the Federal authorities cooperate in any wise—

Mr. Edelbaum: I object to the form of the question.

The Court: Sustained.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court
Raymond B. Grunewald—for Respondent—Direct

Let me ask you this: Was your office or any Federal agency to your knowledge asked to conduct a Grand Jury investigation, United States District Court for the Eastern District of New York, for the purpose of assisting the District Attorney of Kings County in an independent investigation of his?

The Witness: No, sir.

The Court: Did you at any time ask any person connected with the District Attorney's office or any law enforcement agent of the City of New York to conduct a Grand Jury investigation into the activities of Mr. Powell in order to assist in any investigation you may have had?

The Witness: Defintely not, sir.

Mr. Edelbaum: No further questions.

Mr. Koota: No questions.

(The witness was excused.)

The Court: Counsel will step up.

(Conference at the bench.)

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court
Richard I. Powell—Respondent—Sworn

RICHARD I. POWELL, the Respondent herein, called as a witness in his own behalf, having been first duly sworn by the Clerk of the Court and stating his address as 1339 East Boxwood Drive, Hewlett, New York, testified as follows:

Mr. Edelbaum: Your Honor, before I go any further, there is one question I had asked of Mr. Grunewald which your Honor had said that he would have to get permission. I think in fairness to—I feel that in the interests of my position that I should find out whether or not the Federal Government has any objection to my getting access to any reports concerning any interviews between the United States attorney's office and the District Attorney's office of Kings County.

The Court: While we are going along with this, I will ask Mr. Grunewald to go out and use my telephone at the government's expense, if necessary, and then he can give me the answer as to what their direction is and then I will rule.

Mr. Grunewald: You, Mr. Edelbaum, want me to produce FBI reports, is that it?

The Court: He asked you if there were, as far as you know, FBI reports which indicated that the Federal Bureau of Investigation had examined papers in the District Attorney's office. We already have testimony from another witness to that effect that that was done, but he has not asked any question yet with respect to a production of those papers.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court Richard I. Powell—Respondent—Direct

Mr. Edelbaum: I would like to get an answer whether permission would be granted for the production of those papers.

Mr. Grunewald: I have, prior to my appearing here, discussed this matter with the Chief of the General Crime Section in Washington, D. C.

The Court: Let's take this statement on the record.

Mr. Grunewald: Prior to my appearance here, when I initially received the subpoena which I believe was sometime last week, I had contacted the Chief of the General Crime Section of the Department of Justice, Washington, D. C., in regard to my testimony here and I was instructed not to disclose any information or material contained in the government's files.

Mr. Edelbaum: That will obviate a telephone call.

The Court: The Court now rules that it lacks the power to compel this witness, an employee of the Federal Government, to answer any questions in that respect.

Mr. Edelbaum: Mr. Grunewald is excused.

Direct Examination by Mr. Edelbaum:

Q. Mr. Powell, you are the Respondent in this proceeding? A. Yes, sir.

Q. On October 21st were you subpoenaed before the Grand Jury of Kings County? A. Yes, sir.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court
Richard I. Powell—Respondent—Direct

Q. Were you asked certain questions with respect to certain slips allegedly in your handwriting? A. Yes, sir.

Q. Prior to that time had you been called before the Federal Grand Jury? A. Yes, sir.

Q. Had you refused to answer any questions with respect to certain slips on the ground that they would tend to incriminate you? A. Yes, sir.

Q. Prior to October 21, 1963, had you been convicted in this court of the crime of grand larceny in the first degree? A. Yes, sir.

Q. Was that in connection with the very same houses, one of the very same houses in which the District Attorney was interrogating you about certain slips? A. Yes, sir.

Q. Were you granted immunity by the District Attorney? A. Yes, sir.

Q. By the Grand Jury? A. Yes, sir.

Q. Did you thereafter refuse to answer any questions on the ground that they would degrade or incriminate you? A. Yes, sir.

Q. When you did that, were you acting in good faith because of the fact that you feared Federal prosecution?

Mr. Koota: I object to the form of that question.

The Court: I will overrule the objection. The question is one of state of mind and I believe he is entitled to testify as to what his state of mind is.

Mr. Koota: Very well, sir.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court Richard I. Powell—Respondent—Cross.

By Mr. Edelbaum:

Q. At that time did you refuse to answer questions on the ground that it might degrade or incriminate you because you had been informed by Mr. Koota that the Grand Jury was not granting you immunity from the sentence you had received on your conviction of grand larceny in the first degree? A. Yes, sir.

Mr. Koota: That is objected to as leading, Judge.
The Court: Overruled.

Q. Were those the only reasons—withdrawn.
When you did that, did you respond in good faith and did you believe in good faith that you were subject to incrimination? A. Yes, sir.

Mr. Edelbaum: I have no further questions.

Cross Examination by Mr. Koota:

Q. Mr. Powell, on the occasion of your appearance before the Grand Jury on October 21, 1963, were you asked the following question and did you make the following answer—page 17:—

The Court: I think we have a stipulation. There is no benefit of asking it again.
Mr. Koota: That is simply a basis for the subsequent question.

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The Court: You are trying to lay a predicate for that one. We already have the predicate. I presume what you want to do is show that these answers would not incriminate and therefore it was not good faith.

Mr. Koota: These were deliberate answers, deliberately given, understanding what he was doing.

The Court: He does not claim that. He did not claim he didn't make deliberate answers. He claims he merely did it in good faith.

Mr. Koota: Relying on the advice of his attorney.

The Court: Right.

By Mr. Koota:

Q. Mr. Powell, you were asked seven questions before the Grand Jury on October 21, 1963, which you refused to answer on the ground they might incriminate or degrade you; is that correct? A. Yes.

Q. If you were called before the Grand Jury now and asked the same questions—

The Court: I am going to preclude you from that now.

Mr. Koota: Very well.

Mr. Edelbaum: That is the Respondent's case, your Honor.

The Court: Take a five-minute recess and I will hear argument.

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(Whereupon a brief recess was taken.)

(Hearing resumed.)

The Court: You may be heard, Mr. Edelbaum.

Mr. Edelbaum: Your Honor, I most respectfully submit that on the evidence of the hearing in this case as disclosed before your Honor, that the District Attorney has utterly failed to prove beyond a reasonable doubt that the Respondent did not assert his privilege in good faith.

I say that by no finding from this record could it be held that he was contumacious, wilful, in his refusal to answer.

I say, in view of the fact that he was actually called before the Grand Jury for the Eastern District of New York, was actually interrogated concerning the very slips that were supplied by the District Attorney of Kings County which were contained among other slips of which he was being interrogated about, that this Respondent in good faith, after consultation with his attorney, actually believed that he would suffer incrimination.

In addition to that, your Honor, there seems to me to be a fundamental unfairness about these proceedings. It is developed from Mr. Koota that at a time when an indictment was actually pending and before the Respondent was tried, the District Attorney had knowledge of these slips, had knowledge about the alleged payoffs contained in these slips.

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The Respondent was available to be called before the Grand Jury and the District Attorney was advised then that he would avail himself of his constitutional privilege if he was interrogated.

The District Attorney at that time had the absolute right to bring this Respondent before the Grand Jury while this indictment was pending—

The Court: The District Attorney is perfectly within his right to proceed to prosecute a man on evidence he has without bringing him before the Grand Jury and if he convicts him, he is entitled then to press him for further evidence which might disclose other crimes and other persons involved in them, provided that he grants him immunity.

We are not dealing with something ethereal. Such thing is fair play. We are entitled to proceed under the ordinary procedures of law and, having convicted him on evidence which was not obtained as a result of any Grand Jury disclosures, he is then entitled to pursue it.

You have an exception.

Mr. Edelbaum: I disagree with your Honor most respectfully and I say on the entire case that there is a reasonable doubt, particularly in view of the fact that the Respondent actually feared Federal incrimination.

The Court: With respect to the rulings, the Court holds that to compel him to answer will not violate his constitutional rights; that the federal government, by instituting a proceeding of this nature can-

not preempt the field and prevent the state from pursuing its lawful remedies, investigations for the purpose of disclosing crimes, particularly crimes which involve unfaithful public servants.

If evidence given before this Grand Jury would incriminate the defendant on a Federal case, the remedy lies with preventing its use in the Federal case. It would be up to the Federal Government to permit him to invoke his constitutional privilege against self-incrimination there on the grounds that the disclosures made before the Grand Jury of the County of Kings were not voluntary disclosures but were coerced by judicial authority.

I further hold that there is no evidence here of any conspiracy existing between the Federal authorities and the State authorities to use evidence obtained one place for the purpose of convicting the defendant of another crime in another jurisdiction and the Court will rule that if the defendant is directed to answer these questions and if he does answer them, the evidence which is revealed before the Grand Jury may not be disclosed to any Federal Grand Jury without a Court Order on notice to the defendant's counsel.

There is nothing wrong with law enforcement agents cooperating with each other if evidence of a Federal crime is disclosed. It is not only the right of the District Attorney, the local prosecutor, to inform the Federal prosecutor of that crime, but it is his duty and similarly it is the duty of any Fed-

eral prosecutor that has evidence of a local crime, to turn it over to the State prosecutor.

What might be forbidden is that if one Grand Jury is called for the purpose of eliciting testimony from a defendant not to be used in that jurisdiction but to be obtained solely as a result of a conspiracy for the purpose of using it in another jurisdiction.

Now with respect to the claim of good faith, I believe that the defendant was entitled, up until this moment, to make these claims, to have the advice of counsel, and to make his protests heard. But, now, having exhausted those remedies, it is my opinion that the Court has the power to direct him to answer the questions. The question then of good faith is gone because he is now told what the law is; he's got a judicial ruling with respect to it.

As to the seven questions, can somebody point those out to me?

Mr. Koota: Page 17.

The Court: Let the Respondent stand up.

(Richard I. Powell, the Respondent herein, comes forward.)

The Court: Mr. Powell, the Court now directs that you answer the following questions put to you before the Grand Jury.

Mr. Edelbaum, if you desire me to do this without public disclosure at this time, I will let you read the questions, confer with your client with respect to them so that there need not be any public disclosure.

Mr. Edelbaum: Yes, your Honor. Page 17.

The Court: And 18.

Mr. Koota: And 19.

The Court: Down to the top of page 20.

Mr. Edelbaum: Yes, your Honor. Ends at the bottom of page 19.

(Mr. Edelbaum confers with Respondent.)

The Court: I direct that you return to the Grand Jury forthwith.

Is the Grand Jury in session?

Mr. Koota: I don't know if they are in session at this moment. May we ask for the direction for tomorrow morning, Judge?

The Court: I think you should have had them here. I have other things to do tomorrow morning.

Mr. Koota: I couldn't anticipate the court's ruling.

Mr. Edelbaum: We may obviate, your Honor,—

The Court: I direct that you return to the Grand Jury and answer the questions proposed to you on Pages 17, 18 and 19 of the stenographic minutes of October 21st of 1963, and I further direct—no—with respect to those minutes—your failure to answer those questions pursuant to the Court's direction will be construed by the Court as being wilful and contumacious and will constitute a contempt of court for all of your legal arguments have already been made. You have had a full hearing and the Court has made its determination.

Hearing of November 7, 1963 on Application to Adjudicate Witness for Contempt of Court

If you desire to obviate the necessity for appearing before the Grand Jury, if you or your counsel state that, despite the direction, you will continue to refuse to answer, you may do so.

Mr. Edelbaum: May I say to your Honor that I had consulted with the Respondent prior to this moment and I had discussed what would happen in the event your Honor would do exactly what you have done and I have been authorized by the Respondent to respectfully state to your Honor that he adheres to his position and he respectfully refuses to answer the questions on the ground that they may degrade or incriminate him and to bring him before the Grand Jury again would be an idle gesture.

The Court: The Court then finds that this defendant is in contempt of court and has wilfully and contumaciously refused to abide by the direction of the Court after a full hearing by his legal counsel and all legal points having been raised.

I direct that he appear for sentence here on Tuesday morning.

Mr. Edelbaum: Could you make that Wednesday morning?

Mr. Koota: Wednesday is satisfactory.

The Court: Very well. I will parole him in your custody until such time. The Court will further direct that if the defendant is recalled to this Grand Jury at any time, he must answer not only these questions but any other question which is pertinent to the inquiry. If the question of relevancy is raised, then the Court will hear the argument of counsel

with respect to relevancy in camera at any time and all those objections shall be noted in the minutes of the Grand Jury, and the question passed, so that we won't have a continuous running back and forth. If he is called before the Grand Jury, if he raises the objection, the question is passed until the entire investigation is exhausted. Then you may ask for rulings on the specific question.

Mr. Edelbaum: Your Honor, in order to obviate this, may we state our position very clearly. Of course, with all due deference to your Honor's ruling.

The Court: You intend to take an appeal, I presume, and you are entitled to it. Let me say this with respect to the effect of the immunity conferred by the District Attorney, the Court now rules that in the event the conviction of this defendant presently sub judice in the Appellate Division is reversed, any testimony given from here on with respect to that matter may not be used against him in any subsequent retrial of this case. His testimony would not exonerate him from the previous crime if he were reversed but the evidence which was elicited can't and may not be used against him because it was not voluntary made.

The Clerk: Richard I. Powell, you are advised that you are being continued on parole and should you fail to appear when directed, you may be charged with the crime of parole jumping.

Order of Commitment

At a Criminal Term, Part I, of the Supreme Court of the State of New York, Kings County, at the Courthouse thereof, Civic Center at Montague Street, Borough of Brooklyn, City and State of New York, on the 13th day of November, 1963.

Present:

HON. MILES F. McDONALD,

Justice.

No. 3316/1963

In the Matter of the Application of the DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful and contumacious refusal to testify before the said Grand Jury.

It appearing to the satisfaction of this Court that at the October, 1963, Criminal Term, Part I of this Court, a ond Additional Grand Jury for the County of Kings and for this Court, was duly empaneled; and

It further appearing to the satisfaction of this Court that on the 21st day of October, 1963, said Grand Jury was lawfully in session, a quorum being present and was conducting an investigation to determine whether the crimes of bribery, corruption and conspiracy were committed in the County of Kings in connection with the construction of one and two family homes in areas colloquially known as "Mill Basin" and "Canarsie" in Kings County; and

Order of Commitment

It further appearing from the affidavit of Aaron E. Koota, Chief Assistant District Attorney of Kings County, sworn to the 22nd day of October, 1963, that evidence discovered by the personnel of the office of the District Attorney of Kings County indicates that many of these homes were shoddily constructed and in numerous instances, were built in direct violation of the pertinent building codes and laws and, therefore, now are in direct violation of said codes and laws; and

It further appearing from the affidavit of Aaron E. Koota, Chief Assistant District Attorney of Kings County, sworn to the 22nd day of October, 1963, that a domestic corporation known by the name of Donven Realty Corp. and its affiliated corporations had constructed and sold some 300 one and two family houses in the Canarsie area of Kings County; and

It further appearing that the witness, Richard I. Powell, is President of Donven Realty Corp.; is its principal stockholders; its active manager and personally supervised the construction of said homes; and

It further appearing from the affidavit of Aaron E. Koota, Chief Assistant District Attorney of Kings County, sworn to the 22nd day of October, 1963, that on the 16th day of September, 1961, pursuant to a Search Warrant duly issued by a Judge of the County Court, certain books, records and documents of the Donven Realty Corp. were seized in connection with an investigation then being conducted by the office of the District Attorney of Kings County into the construction of said homes; the search of said books, records and documents disclosed numerous no-

tations in writing, indicating the payment of bribes to public officials in various governmental departments of the City of New York; these notations were subsequently identified by the said witness, Richard I. Powell as being in his own handwriting; and

It further appearing to the satisfaction of this Court that Richard I. Powell appeared as a witness before the said Grand Jury in the County of Kings on the 21st day of October, 1963 and was thereupon duly sworn to tell the truth; and

It further appearing to the satisfaction of this Court that the following seven interrogatories were put to the said witness, Richard I. Powell:

1. Mr. Powell, on or about March 23, 1960, in the County of Kings, did you give $530.00 in cash to a public official in the Building Department as a payment on account for 53 houses on East 83rd Street in Kings County to permit you to use clay instead of cast iron pipes?

2. Mr. Powell, on or about April 6, 1960, did you give $530.00 cash to a public official in the Building Department in the County of Kings as a second payment on account for the same 53 houses on East 83rd Street?

3. Mr. Powell, on or about October 16, 1959, did you give to a public official in the Building Department in the County of Kings $350 cash covering 70 houses at five dollars each on East 85th Street on the north side of Avenue N?

4. Mr. Powell, on or about October 9, 1959, in the County of Kings, did you give $590 cash to a public

official in the Building Department to permit an amendment of your plans and specification to permit you to use orangeburg pipe instead of cast iron pipe covering jobs 166 to 194 and jobs 136 to 165, a total of 59 jobs on the basis of ten dollars a job?

5. Mr. Powell, on or about October 27, 1960, did you give $200 cash to a public official in the office of the Borough President's Office of the County of Kings, Borough of Brooklyn, for the grading of Avenue N from East 83rd Street to East 84th Street and also for grading on East 83rd Street between Avenues M and N?

6. Mr. Powell, on or about September 10, 1956, did you pay $500 cash to an official in the Building Department in the County of Kings, City of New York, as noted on Page nine of your cash disbursements book?

7. Mr. Powell, during the period from August, 1956 through April, 1960, did you make payments to officials in the Police Department of the City of New York approximating $3,000?

and;

It further appearing to the satisfaction of this Court that the said witness did refuse to answer the said questions put to him before the said Grand Jury upon the ground that the said answers might degrade and incriminate him; and

It further appearing to the satisfaction of this Court that thereupon in the manner and form provided by law pursuant to Section 2447 of the Penal Law of the State of New York, immunity from prosecution was duly conferred by said Grand Jury upon said witness; and

Order of Commitment

It further appearing to the satisfaction of this Court that thereupon, the said witness continued to refuse to answer said questions put to him before the said Grand Jury upon the ground that said answers might degrade and incriminate him; and

It further appearing to the satisfaction of this Court that by Order of the Hon. Justice Miles F. McDonald, dated the 22nd day of October, 1963, service of which was duly and timely made on the 22nd day of October on Maurice Edelbaum, the attorney for the said witness; the said witness was ordered to show cause before this Court on the 25th day of October, 1963, why an Order should not be made and entered herein adjudicating the said witness to be in Criminal Contempt of this Court for his contumacious and unlawful refusal after being duly sworn, to answer the said seven legal and proper interrogatories or any of them, propounded to him before said Grand Jury and why he should not be punished therefor, pursuant to Section 750 of the Judiciary Law; and

It further appearing to the satisfaction of this Court that said application to adjudge the said witness in Criminal Contempt of this Court was heard by this Court on the 6th day of November, 1963, the adjourned date thereof, and at which time were heard certain witnesses; and Aaron E. Koota, Chief Assistant District Attorney of the County of Kings appearing in support of this application; and the said witness, Richard I. Powell in person and through his attorney, Maurice Edelbaum, appearing in opposition thereto; and that thereafter, said witness upon said hearing, did then and there in open Court, persist in his refusal to answer said interrogatories propounded to him and did

then and there state that he would not answer said interrogatories.

Now, upon reading and filing of the Order to Show Cause of the Hon. Justice Miles F. McDonald, dated the 22nd day of October, 1963, and the affidavit of Aaron E. Koota, sworn to the 22nd day of October, 1963 in support thereof with proof of due and timely service thereof in support of said application and the affidavit of the said witness, Richard I. Powell, and Maurice Edelbaum, his attorney, each of which was sworn to the 24th day of October, 1963 with proof of due and timely service, in opposition thereto; and the Minutes of the hearings and proceedings before this Court held on the 25th day of October and the 6th day of November, 1963; and the Minutes and the proceedings before the said Grand Jury on the 21st day of October, 1963; and upon due deliberation and upon the opinion of this Court duly filed herein; and

Now, on motion of Edward S. Silver, District Attorney of the County of Kings, it is hereby

ORDERED AND ADJUDGED, that the said Richard I. Powell by reason of his contumacious and unlawful refusal to answer the said seven legal and proper interrogatories before the said Grand Jury and by reason of the fact that the said Richard I. Powell did then and there, in open Court, persist in his refusal to answer said interrogatories propounded to him and did then and there state that he would not answer said interrogatories even when directed to return to said Grand Jury, is guilty of a contumacious and unlawful refusal to answer said seven legal and proper interrogatories and is thereby guilty of a wilful disobedience

to the lawful mandate of this Court, all of which is contrary to Section 750 of the Judiciary Law of the State of New York; and it is further

ORDERED AND ADJUDGED, that for the Criminal Contempt of Court in contumaciously, unlawfully and wilfully refusing to answer the interrogatories as hereinabove stated, after being duly sworn as a witness before the said Grand Jury and after persisting in said refusal after being directed by this Court to return before said Grand Jury and answer the said seven legal and proper interrogatories, the said Richard I. Powell be, and hereby is sentenced to be imprisoned in the New York City, Civil Jail for a term of 30 days, and in addition thereto, to pay a fine of $250.00 and in the event that the said Richard I. Powell fail to pay the fine of $250.00 herein assessed against him, that he shall be imprisoned for a term of 30 days additional. Execution of this order is stayed until 10:30 A.M., November 14, 1963.

ENTER

M. F. McD.
J. S. C.

GRANTED
Nov. 13, 1963
ROBERT J. CREWS
Clerk

Notice of Appeal to Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM—KINGS COUNTY

In the Matter of the Application of the DISTRICT ATTORNEY OF THE COUNTY OF KINGS, for an Order adjudging RICHARD I. POWELL, a witness before the Second Additional October, 1963, Grand Jury, to be in Criminal Contempt of Court because of his wilful and contumacious refusal to testify before the said Grand Jury.

SIRS:

PLEASE TAKE NOTICE that Richard I. Powell hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the order of Hon. Miles F. McDonald, Justice of the Supreme Court, Kings County, entered on the 13th day of November, 1963, adjudging him guilty of contempt of court, and from each and every part of said order, and from the whole thereof, does he appeal.

Dated: New York, N. Y.
November 13, 1963

Yours, etc.,

MAURICE EDELBAUM
Attorney for Richard I. Powell
Office & P. O. Address
250 Broadway
New York 7, N. Y.

Notice of Appeal to Appellate Division

To:

Hon. Edward S. Silver
District Attorney, Kings County

Clerk, Supreme Court, Kings
County, Criminal Term
Courthouse,
Civic Centre,
Brooklyn, New York

Order of Affirmance by the Appellate Division, Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 30th day of December, 1963.

Present:

HON. PHILIP M. KLEINFELD,
Acting Presiding Justice,
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" SAMUEL RABIN,
" JAMES D. HOPKINS,
Justices.

In the Matter of the District Attorney of Kings County,

Petitioner-Respondent,

—v.—

Richard I. Powell,

Witness-Appellant.

ORDER ON APPEAL FROM ORDER

The above named Richard I. Powell, witness, in this proceeding having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court,

Order of Affirmance by the Appellate Division, Second Department

dated and entered in the office of the Clerk of the County of Kings the 13th day of November, 1963, after a hearing: which (1) adjudged him to be in criminal contempt on the ground that, although immunity had been accorded him, he refused to testify before the Grand Jury; and (2) sentenced him to serve a term of 30 days in prison and to pay a fine of $250., herein, and the said appellant having moved for a stay of commitment for contempt, pending appeal, by an order to show cause dated November 14, 1963; and the said appeal and motion having been argued by Mr. Maurice Edelbaum of Counsel for appellant, and argued by Mr. Aaron Koota, Assistant District Attorney, of Counsel for respondent.

Now on reading and filing said order to show cause, and the affidavits of Maurice Edelbaum and Aaron Koota, and all the papers filed herein, and due deliberation having been had thereon; and upon the opinion and decision slips of the court herein, heretofore filed, and made a part hereof:

It is Ordered that the order so appealed from be and the same hereby is unanimously affirmed, without costs, and it is

Further Ordered that the said motion for a stay of commitment for contempt, is hereby denied as academic in view of the decision herewith upon the appeal.

Enter:

John J. Callahan
Clerk

Opinion of the Appellate Division, Second Department

[N. Y. Law Journal—January 2, 1964]

By Kleinfeld, Acting P. J.; Christ,

Brennan, Rabin and Hopkins, JJ.

In a proceeding by the District Attorney of Kings County, under article 19 of the Judiciary Law (sec. 750 et seq.), to adjudge a witness in criminal contempt of court, the witness appeals from an order of the Supreme Court, Kings County, made November 13, 1963, after a hearing: which (1) adjudged him to be in criminal contempt on the ground that, although immunity had been accorded him, he refused to testify before the grand jury; and (2) sentenced him to serve a term of thirty days in prison and to pay a fine of $250. Order affirmed, without costs. No opinion.

Order to Show Cause for Leave to Appeal to Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION

OF

The District Attorney of the County of Kings for an Order Adjudging Richard I. Powell a Witness Before the Second Additional October 1963 Grand Jury to be in Criminal Contempt of Court Because of His Wilful and Contumacious Refusal to Testify Before the Said Grand Jury,

RICHARD I. POWELL,

Appellant.

EDWARD S. SILVER, District Attorney,

Respondent.

Upon reading the annexed affidavit of Maurice Edelbaum, Esq., duly sworn to the 7th day of January, 1964, upon the testimony of Richard I. Powell before the Second Additional October 1963 Grand Jury, upon the order of the Appellate Division, Second Judicial Department, dated December 30, 1963 and upon the other proceedings heretofore had herein,

SUFFICIENT CAUSE APPEARING THEREFOR,

LET the Hon. Edward S. Silver, District Attorney of Kings County show cause before this Court, at the Court-

Order to Show Cause for Leave to Appeal to Court of Appeals

house at Albany, New York, on the 15th day of January 1964 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard WHY an order shall not be made and entered herein staying the commitment for contempt of court of Richard I. Powell until determination of his application for leave to appeal to the Court of Appeals, and WHY such other and further relief shall not be granted as may be proper herein.

In the meantime, it is ORDERED that execution of the commitment for contempt of court be and it is hereby stayed pending the disposition of said motion for leave to appeal to the Court of Appeals.

LET service of a copy of this order to show cause together with the affidavit annexed upon the District Attorney of Kings County on or before January , 1964, before o'clock in the afternoon of said day be deemed sufficient.

Dated: New York, N.Y.
January , 1964

.....
Chief Judge, Court of Appeals

Affidavit of Maurice Edelbaum Read in Support of Motion for Leave to Appeal, etc.

COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION

OF

The District Attorney of the County of Kings for an Order Adjudging Richard I. Powell a Witness Before the Second Additional October 1963 Grand Jury to be in Criminal Contempt of Court Because of His Wilful and Contumacious Refusal to Testify Before the Said Grand Jury,

RICHARD I. POWELL,

Appellant.

EDWARD S. SILVER, District Attorney,

Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MAURICE EDELBAUM, being duly sworn, deposes and says: That he is the attorney for Richard I. Powell in the above entitled matter and is fully familiar with all of the facts and circumstances in connection herewith.

That he makes this affidavit in support of the appellant-movant herein Richard I. Powell's application for permission to appeal to this Court from an order entered on December 30, 1963 by the Supreme Court of the State of

New York, Appellate Division, Second Department, which affirmed an order made and entered on the 13th day of November, 1963, which adjudged the appellant guilty of criminal contempt on the ground that although immunity had been accorded him he refused to testify before the Grand Jury and sentenced him to serve a term of thirty days in prison and to pay a fine of $250.

There is presented together with these motion papers a certified copy of the Record of the proceedings below in this matter.

The fact and circumstances leading up to the order appealed from are as follows: The appellant Richard I. Powell is president of Donven Realty Corp. which, with affiliated corporations, has constructed and sold some three hundred one and two family houses in the Canarsie area of Kings County. On October 21, 1963 the appellant appeared as a witness before the Second Additional October 1963 Grand Jury in the County of Kings where he was asked seven questions aimed at eliciting whether he had paid bribes to public officials in connection with the construction requirements applicable to the aforesaid houses. The appellant refused to answer said questions on the ground that the answers might degrade and incriminate him. Thereupon the Grand Jury purported to confer upon the appellant immunity pursuant to Penal Law §2447. The appellant thereupon inquired whether this immunity would protect him against Federal prosecution, and he was advised by the Assistant District Attorney, Aaron E. Koota, Esq., that it would not. The appellant also inquired whether the immunity would affect a conviction which is presently being appealed in which the appellant

had been convicted of grand larceny in connection with the sale of one of the aforesaid houses, and Mr. Koota represented that if that conviction were reversed on appeal and the appellant were ordered to a new trial on the same indictment then the immunity would apply, but that if the conviction were affirmed on appeal the immunity would be inapplicable. The appellant thereupon continued his refusal to answer the aforementioned seven questions.

At the time of the appellant's aforesaid Grand Jury appearance the appellant knew or in good faith believed that there had been some information transmitted or shown by the office of the District Attorney of Kings County to the office of the United States Attorney of the Eastern District of New York which purported to show that the appellant had paid bribes to public officials in connection with the home-building operations of his companies in Brooklyn. Also, in April, 1963, the appellant had appeared as a witness before a Federal Grand Jury in the Eastern District of New York pertaining to that same or to a related subject matter. In the latter Federal Grand Jury proceeding the appellant had invoked the Fifth Amendment privileges against self-incrimination and he was excused by the Federal Grand Jury.

By order to show cause dated October 22, 1963, signed by the Honorable Miles F. McDonald, Justice of the Supreme Court, Kings County, upon an annexed affidavit of Assistant District Attorney Aaron E. Koota, the appellant was cited for contempt for his refusal to answer the aforementioned seven questions before the Kings County Grand Jury on October 21, 1963.

Affidavit of Maurice Edelbaum

The appellant filed an answer to the aforesaid contempt citation in the form of an affidavit, denying contumacious intent and averring *inter alia*, that he feared Federal incrimination if he were forced to answer the aforementioned seven questions before the Kings County Grand Jury. The appellant also requested a judicial trial in the manner of a criminal trial of the issue of his guilt or innocence, and he requested a jury trial of the charge of criminal contempt.

The appellant was granted the right to a trial before the Honorable Miles F. McDonald, Justice of the Supreme Court, with permission to introduce testimony, and being accorded the presumption of innocence and the rule of reasonable doubt, but being denied a jury trial, to which exception was duly taken.

The trial was held on November 7, 1963. Testimony taken from Raymond Bernhard Gruenwald, Assistant United States Attorney in the Eastern District of New York, Aaron E. Koota, Chief Assistant District Attorney of Kings County and Irving P. Seidman, Assistant District Attorney in Kings County, established that the office of the District Attorney of Kings County had in fact sought out the United States Attorney for the Eastern District of New York many months prior to appellant's Kings County Grand Jury appearance in October, 1963, for the purpose of supplying to the United States Attorney information and documents obtained under a search warrant by the Kings County District Attorney which allegedly indicated the payment by the appellant of bribes to Federal housing officials; that the United States At-

torney had been in possession of this information at the time of appellant's appearance before the Federal Grand Jury as aforesaid; that agents of the Federal Bureau of Investigation had conferred upon this subject with representatives of the Kings County District Attorney's office, along with representatives of the United States Attorney's Office; and that, apparently, additional information relating to this cooperation between the Federal and State prosecutive officials was in the possession of the Federal officials but would not be disclosed by them in the within State Court contempt proceedings before Mr. Justice McDonald on the ground of confidential Federal privilege to refuse to disclose the contents of criminal prosecution files of the United States Department of Justice.

The appellant took the stand in the aforesaid contempt trial of November 7, 1963 before Mr. Justice McDonald, at which time appellant denied any contumacious intent and swore that he feared Federal incrimination.

It was urged, in a memorandum of law, on behalf of appellant in the contempt proceedings before Mr. Justice McDonald that the indications in this record of collaboration between the Federal and State prosecutive officials with a view to incriminating the appellant justified the appellant in declining the proffered State immunity by reason of its failure to immunize the appellant against Federal incrimination, appellant invoking the authority of *Knapp* v. *Schweitzer*, 357 U.S. 371, where the Supreme Court, although approving a State grant of immunity even though Federal incrimination might result, did also expressly reserve the case of an actual Federal-State co-

operative effort at incrimination. The appellant also brought to the attention of Mr. Justice McDonald that on October 14, 1963 the Supreme Court of the United States had granted certiorari in the case of *Murphy* v. *New York Harbor Waterfront Commission* (October Term 1963, No. 138), the principal question in the Murphy case being whether purported State grants of immunity were valid notwithstanding express exclusion of immunity against Federal incrimination and notwithstanding the indicated probability of Federal-State collaboration in the incrimination situation presented. Further included in *Murphy* was the question of whether *Knapp* v. *Schweitzer*, 357 U.S. 371 (approving a State grant of immunity even though Federal incrimination might result) and *Feldman* v. *United States*, 322 U.S. 467 (permitting use in a Federal prosecution of evidence coerced through a State grant of immunity) should be over-ruled. See 32 U.S. Law Week p. 3125 (October 15, 1963). We also advised Mr. Justice McDonald that the grant of certiorari in the *Murphy* case, *supra*, was significant for still another reason which is pertinent to the instant situation, namely, that the United States Supreme Court has set down the *Murphy* certiorari to be argued concurrently with *Malloy* v. *Hogan*, October Term 1963, No. 110, the *Malloy* case involving the sheer and simple but historic constitutional issue of whether the Fifth Amendment self-incrimination provisions applies directly to the States, through the Fourteenth Amendment.

Mr. Justice McDonald held that the rule of *Knapp* v. *Schweitzer* which permits State immunity without protection against Federal incrimination, being as yet unreversed

by the Supreme Court of the United States, was applicable to the instant case notwithstanding the grant of certiorari in the *Murphy* case—and otwithstanding, it may be added, that the *Knapp* dicision was 5 to 4. Mr. Justice McDonald also ruled that State grand jury evidence in this matter may not be disclosed to any Federal grand jury without a Court order. Mr. Justice McDonald also held that the reservation in the *Knapp* case as to instance of Federal-State collaboration was likewise inapplicable here because such collaboration was not established by the testimony in the instant contempt trial. Mr. Justice McDonald noted, in the latter connection, that he was powerless to force the Federal-officials witness to disclose further contents of the Federal files or records relating to this case. Mr. Justice McDonald found the appellant guilty of contempt of court and sentenced him as previously herein recited.

I hereby respectfully represent to this Court that serious and indeed unusually important Constitutional issues are presented for decision in this case. The issue of Federal-State incrimination is deemed, right at this time, by the Supreme Court of the United States to be of sufficient gravity to justify the seriousness of that Court's now-a-days rarely granted power of certiorari. That if the Constitutional issues raised in this appeal are not sufficient weight to grant appeal by right to the Court of Appeals, they are still of sufficient importance for the Court of Appeals to rule in a case of this nature. Since this appeal eventually will be brought before the United States Supreme Court—unless the issue shall have been sooner put to rest by a decision of the United States Supreme Court in the *Murphy* and *Malloy* cases.

Affidavit of Maurice Edelbaum

The probability is all too real that if this Court does not grant a stay of execution of sentence sought herein, the appellant may have served a prison sentence for contempt of Court on the basis of an ostensible rule of law which may be a legal nullity by declaration of the highest court of the land within a matter of little more than one month after the appellant finishes the serving of said sentence. There is practically no doubt at all that unless this Court grants a stay, the appellant will have to have served his entire sentence before an appeal to the Court of Appeals can be perfected.

Appellant is not a common criminal or a man with a criminal record, apart fro mthe troubles which have fallen upon him in connection with his Brooklyn house construction activities. He is a substantial businessman and a family man. A jail sentence, especially a jail sentence, which, in all likelihood may turn out to have been erroneously imposed, as a matter of Federal Constitutional Law, should not be required of a man in the position of this appellant in the circumstances of this case in the present posture.

That no previous application for the relief requested herein has heretofore been made to this or any other Court.

WHEREFORE, your deponent respectfully prays for the granting of the relief requested in the annexed order to show cause.

(Sworn to by Maurice Edelbaum on January 7, 1964).

Affidavit of Aaron E. Koota Read in Opposition to Motion for Leave to Appeal, etc.

COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION

OF

The District Attorney of the County of Kings for an Order Adjudging Richard I. Powell a Witness Before the Second Additional October 1963 Grand Jury to be in Criminal Contempt of Court Because of His Wilful and Contumacious Refusal to Testify Before the Said Grand Jury,

RICHARD I. POWELL,

Appellant.

EDWARD S. SILVER, District Attorney,

Respondent.

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

AARON E. KOOTA, being duly sworn, deposes and says:

I am Chief Assistant District Attorney in the County of Kings. I am fully familiar with all proceedings heretofore had herein having personally participated therein.

I submit this affidavit in opposition to an application by Appellant, Richard I. Powell, for leave to appeal to this court and for a stay of the execution of the order of commitment herein until the determination of this appeal.

Affidavit of Aaron E. Koota

We oppose the application for leave to appeal because we believe there is no merit to it and that in view of existing law, this honorable Court would have no alternative to an affirmance.

In September of 1961, as a result of the execution of a search warrant against this appellant and building corporations which he controlled, our office obtained certain records. These consisted of notations on slips of paper subsequently conceded by this appellant to be in his handwriting. These slips of paper contained notations of pay-offs made to various public officials in various departments in the City of New York. These slips were some three hundred in number. In addition to evidencing payments to New York City officials, they indicated also payments made to various officials in the Veteran's Administration and the Federal Housing Authority of the United States Government.

Since September of 1961 we have made every effort and availed ourselves of every legal process to compel this appellant to testify under oath concerning these payments. More than two years have now elapsed and every effort to compel such testimony has been successfully resisted by appellant.

If these notations are true, then appellant had engaged in wholesale bribery and corruption of public officials in connection with the construction by him or his wholly controlled corporations of some three hundred one and two family homes in the Mill Basin and Canarsie areas of the County of Kings.

Thus it would appear that there are presently on the payroll of the City of New York miscreant public officials

whose office should have been forfeited long ago if in fact they accepted bribes from appellant and if the evidence warranted should have been indicted for those crimes. But these officials are permitted to remain on the City's payroll because of the intransigence of this appellant.

It seems to us therefore that it ill behooves this appellant to plead for consideration to this Court and in effect ask a Court of Justice to condone his misconduct.

We also oppose application for a stay as is evident from the foregoing because the Grand Jury is engaged in this investigation into bribery and corruption of New York City officials in connection with the construction of these homes: Appellant has stopped the Grand Jury at the very threshold of its inquiry. Unless prompt punishment is meted out to this appellant and he is made to realize that he must either comply with the law or be punished for his defiance, this entire investigation will be frustrated.

If the situation before this Court presented an appeal from an insolated crime, divorced from a general inquiry, there might be some justification for a stay; but there is none when the effect of appellant's contempt is to foreclose proper judicial inquiry into crimes in this County.

While ostensibly the application is for leave to appeal and to stay the commitment until the determination of the appeal, it is clear from the moving affidavits that appellant is really requesting a stay until the United States Supreme Court has rendered a decision in *Murphy* v. *New York Harbor Waterfront Commission* and in *Malloy* v. *Hogan* in which the Supreme Court granted certiorari to determine in effect whether the rule established in *Knapp* v.

Schweitzer should be overruled. Whether the Supreme Court will so overrule the principles in the Knapp case is, of course, a matter of pure conjecture. Months may lapse before it arrives at a determination.

But the law in the State of New York is, and appellant does not seem to question it, that it is not a valid basis for refusal to answer proper interrogatories before a Grand Jury where immunity has been granted under the State law upon the ground that such immunity does not extend to Federal prosecution (Knapp v. Schweitzer 2 N.Y. 2d 913, 357 U.S. 371).

Moreover, appellant's objection as to the scope of immunity granted is not a matter that is properly before the *State* Court. It is an argument that may be presented to a *Federal* Court, in the event that the testimony elicited from him before the Kings County Grand Jury is used against him in a Federal prosecution. If the Fifth Amendment to the Federal Constitution is to be made applicable to the States and appellant is indicted in the Federal Court as a result of his State testimony, then he might well argue against Federal prosecution that his Federal rights under the Fifth Amendment were violated; but in any event he must testify before a State Grand Jury.

It is clear, therefore, that there is no substantial merit to this application on the existing law. A stay here would do irreparable damage to the current Grand Jury investigation. The Grand Jury is faced with the problem of the Statute of Limitation running since these notations relates to the years 1957, 1958, 1959, 1960 and 1961.

A suggestion is made by appellant that this investigation by the Grand Jury is a devious device concocted in conspira-

torial secrecy between the United States Attorny and the Kings County District Attorney for the sole purpose of extracting evidence from appellant in the State proceeding for use only in a Federal prosecution. Suffice it to say that the record sub judice effectively negates this conclusion. Testimony before Mr. Justice McDonald below evidences a a complete lack of merit in this contention.

It is true that among the slips of paper in appellant's handwriting, were notations of payments made to Federal officials. We simply turned these papers over to the Federal authorities, which was our plain duty and responsibility. Beyond that, as the record shows, there was absolutely no cooperation between the two agencies. At page 8 of his affidavit appellant states that he is not a common criminal. I do not know what this means but I do know that there is prima facie evidence of wholesale bribery and corruption by appellant of public officials. If appellant in this view is not a common criminal then I do not understand the meaning of that term.

I respectfully pray that the motion herein be denied.

(Sworn to by Aaron E. Koota on January 10, 1964.)

Order Denying Leave to Appeal to the Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-third day of January A. D. 1964.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 111

In the Matter of
the District Attorney of Kings County,
Respondent,

vs.

Richard I. Powell,
Appellant.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said notice be and the same hereby is denied.

GEARON KIMBALL
Deputy Clerk

Order of Court of Appeals Granting Stay Pending Certiorari

Before:

HONORABLE CHARLES S. DESMOND,

Chief Judge of the Court of Appeals of the State of New York.

IN THE MATTER OF

THE DISTRICT ATTORNEY OF KINGS COUNTY,

Respondent,

against

RICHARD I. POWELL,

Appellant.

An order having heretofore been made herein on November 13, 1963 by the Supreme Court of the State of New York, Kings County, adjudging the appellant guilty of criminal contempt on the ground that, although immunity had been conferred upon him, he refused to testify before the Grand Jury, and sentencing said appellant to serve a term of thirty days imprisonment and to pay a fine of $250.00 and thereafter that order having been heretofore, by order dated December 30, 1963, unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and the Court of Appeals of the State of New York having on January 23, 1964 denied a motion for leave to appeal from said order of affirmance, and an application having been made before me for a stay pursuant to 28 U.S.C. §2101 of the commitment of the appellant pending the hearing and determination of a petition for certiorari to the Supreme Court of the United States.

Order of Court of Appeals Granting Stay Pending Certiorari

Now, in order that appellant may have adequate opportunity to present his application for certiorari to the Supreme Court of the United States, after hearing Maurice Edelbaum, Esq., attorney for the appellant, in support of the application and Edward S. Silver, Esq., District Attorney, Kings County (Aaron E. Koota, Esq., Chief Assistant District Attorney), having indicated that he would not oppose a stay provided further proceedings are not delayed, it is hereby

ORDERED, that all proceedings for the commitment of the appellant pursuant to the order of November 13, 1963 as affirmed by the order of December 30, 1963 and as to which leave to appeal was denied on January 23, 1964 be and the same hereby are in all respects stayed pending the hearing and determination of a petition for certiorari to the Supreme Court of the United States provided, however, that said petition be filed within thirty days from the date hereof; and it is further

ORDERED, that the stay granted hereby shall become inoperative and of no effect immediately upon the expiration of thirty days if no application be then pending before the Supreme Court of the United States, and it is further

ORDERED, that the original of this order be filed in the office of the Kings County Clerk and that copies thereof be served upon the District Attorney of Kings County and upon the Clerk of the Court of Appeals.

Dated: at Albany, New York
January 23, 1964

CHARLES S. DESMOND
Chief Judge of the Court of Appeals
of the State of New York

Notice of Appeal to Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

IN THE MATTER OF THE APPLICATION

OF

The District Attorney of the County of Kings for an Order Adjudging Richard I. Powell a Witness Before the Second Additional October 1963 Grand Jury to be in Criminal Contempt of Court Because of His Wilful and Contumacious Refusal to Testify Before the Said Grand Jury,

RICHARD I. POWELL,

Appellant.

EDWARD S. SILVER, District Attorney,

Respondent.

SIRS:

PLEASE TAKE NOTICE that Richard I. Powell, above named, hereby appeals to the Court of Appeals of the State of New York, from an order of the Appellate Division, Second Judicial Department, entered on the 30th day of December, 1963, which order affirmed an order of the Supreme Court of Kings County, made and entered on the 13th day of November, 1963, by the Hon. Miles F. McDonald, Justice of said Court, adjudging the appellant guilty of Criminal Contempt and sentencing him to a term of thirty days and

a fine of $250. and from each and every part of said order of conviction and from the whole thereof does this appellant appeal.

PLEASE TAKE FURTHER NOTICE that this appeal is taken as of right pursuant to §5601(b)(1) of the Civil Practice Laws and Rules.

Dated: New York, N. Y.
January 21, 1964.

Yours, etc.,

MAURICE EDELBAUM
Attorney for Richard I. Powell
Office & P. O. Address
250 Broadway
New York 7, New York

To:

HON. EDWARD S. SILVER
District Attorney
Kings County
Municipal Building
Brooklyn 1, New York

CLERK, SUPREME COURT
Criminal Term
County of Kings

Sentence

SUPREME COURT

KINGS COUNTY

CRIMINAL TERM—PART 1

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

RICHARD I. POWELL,

Defendant.

(Ind. No. 3316/1963: Contempt)

Brooklyn, New York
November 13, 1963

Before:

HON. MILES F. McDONALD,

Justice

Appearances:

AARON E. KOOTA, Esq.
Chief Ass't District Attorney
For the People

MAURICE EDELBAUM, Esq.
Attorney at Law
For the Defendant

BURTON H. SULZER
Court Stenographer

Sentence

Mr. Edelbaum: May I approach the Bench with counsel?

The Court: Yes.

(Discussion at the Bench.)

The Court: Arraign the defendant for sentence.

The Clerk: What is your name?

The Defendant: Richard I. Powell.

The Clerk: Is Mr. Edelbaum your lawyer?

The Defendant: Yes.

The Clerk: Richard I. Powell, if you have any legal cause to show or anything else to say why the judgment of the law should not be pronounced upon you, say it now and address yourself to the Court. Is there anything you want to say Richard Powell, or do you wish your attorney to speak for you?

The Defendant: I wish my lawyer.

Mr. Edelbaum: Your Honor, this defendant has a legal position that he has taken in this case to protect himself after having been advised of his Constitutional rights by his counsel. Counsel, in good faith has given him certain advice. He has, on his own, decided to act on what his rights are, your Honor. This is not a deliberate contempt of this Court.

The Court: Wait a minute. It is a deliberate act on his part. He now has had all his rights reviewed in a legal determination. Any further refusal is a deliberate act. You mean it is done in good faith, but it is deliberate.

Mr. Edelbaum: I accept what your Honor says, it is a deliberate act, but I say to your Honor it is done in good faith.

Sentence

The Court: That does not relieve him from contempt.

Mr. Edelbaum: It is not done in defiance of this Court.

The Court: Oh yes it is, because the Court has made an order and he deliberately refuses to obey that order; that is defiance.

Mr. Edelbaum: Your Honor, the question as to whether or not a defendant is protected by dual immunity is a serious question which is now being reconsidered by the Supreme Court of the United States.

The Court: Reconsidered! There has already been a determination.

Mr. Edelbaum: It is now being reconsidered by the highest court of this land.

Surely, your Honor, a defendant, in view of the fact that such a proceeding is taking place, has a legal right to test out his position.

The Court: He has tested it. I haxe made a judgment based upon the law as it exists now after a full hearing had been given to him.

Mr. Edelbaum: All I am asking your Honor to do if you impose any sentence, in all fairness, is an opportunity to go to the Appellate Division and file my notice of appeal. I could not file notice of appeal until your Honor sentences. I have been engaged in a murder trial and then there was a second stage proceeding which was completely novel to me. I have been engaged in preparing witnesses for the new proceeding. This thing happened last week. Your Honor, I have been physically unable to prepare papers. I assumed, your Honor, that in the interest of justice the Court would give me a few days to bring to an Appellate Division Justice an order to show cause.

Now, this man was paroled in my custody; he appeared here. He will appear and respond.

Now, surely, surely the interest of justice could not be impaired by another two days for me to prepare an order to show cause, and to parole him in my custody at this time. That is all I am asking, Judge.

The Court: Let me say this, this case was adjourned over a period of ten days to two weeks to give you an opportunity to finish your case. The murder case was completed before this hearing.

Mr. Edelbaum: The jury was out during the hearing, your Honor.

The Court: The murder case was completed as far as that was concerned.

Mr. Edelbaum: It isn't completed yet, sir.

The Court: There is a second stage proceeding.

Mr. Edelbaum: Correct.

The Court: The sentence was adjourned from last Thursday until today, which is a Wednesday.

Mr. Edelbaum: Yes, your Honor.

The Court: In order to give you the opportunity that I thought you were going to take to prepare your papers for a stay. Now, you have had six days. You may say that there were holidays in there, and there were.

Mr. Edelbaum: Your Honor, I work Saturday and Sunday, and I worked Saturday and Sunday on the murder case that I was preparing. I have a number of witnesses that I had to see in connection with the second stage. I have worked every day and night, your Honor. I have a certain endurance—

The Court: Mr. Edelbaum, with your experience I am

certain that you have at least five or six sets of forms of how to go about that. All you have to do is change the names and submit the matters to the Appellate Division. You have a very able young son who is associated with you in the practice of law.

Now, I will tell you what I am going to do: First, before I pronounce judgment on this man I want to know whether he desires an opportunity to purge himself of this contempt by going before the Grand Jury and testifying before I order his commitment?

Mr. Edelbaum: We appreciate the opportunity that your Honor is giving to him at this time, but he has consulted with me about that and he respectfully declines that opportunity, your Honor.

The Court: All right. He is sentenced to thirty days in Civil Prison, plus a fine of $250.00. In default of payment of the fine he is sentenced to an additional thirty days.

The execution of the order is stayed for 24 hours.

Mr. Edelbaum: Thank you.

The Court: Now you have until tomorrow morning.

Mr. Koota: Does that mean, your Honor, that the witness is to appear here tomorrow morning?

The Court: He is to surrender or you pick him up on a bench warrant.

Mr. Edelbaum: Your Honor, will you make that until 12:00?

The Court: I said 24 hours, that is 10:30.

Mr. Edelbaum: He will be here.